In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-615

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, ET AL.,

Petitioners,

v.

FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

VOLUME I

JOHN A. LLOYD, JR.
NANCY A. LAWSON
610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202

Counsel for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

CITATIONS

Cases: Page

Statutes and Constitutional Provisions: Page

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, ET AL.,

Petitioners,

v.

FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioners, Board of Education of the City School District of the City of Cincinnati; Robert A. Braddock, Edward A. Geers, Virginia K. Griffin, Henry C. Kasson, John S. Rue, Mary T. Schloss, J. Howard Sundermann, Jr., the members of that board; James N. Jacobs, Superintendent of the Cincinnati Public Schools; Carl H. Heimerdinger, Clerk-Treasurer of the Cincinnati Public Schools; Susan MacLaughlin, Betty MacLaughlin, Jerry MacLaughlin, William MacLaughlin, Elisa MacLaughlin, Jennifer A. Patty, Joseph Charles Patty, Mary Katherine Patty, Guy Michael Patty, Joseph C.

Patty, Jr., and Mary Ann Patty, students attending the Cincinnati schools and their parents, on behalf of themselves and as representative parties on behalf of all similarly situated school districts in Ohio, the members of the boards of education for such school districts, all administrators employed by such school districts, the students who reside therein and attend public elementary and secondary schools operated by such school districts and the parents of such students, pray for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio entered in this case on June 13, 1979.[1]

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 58 Ohio St. 2d 368 (App., pp. 28(a)-55(a)). The opinion of the Court of Appeals for Hamilton County, Ohio is reported at 10 Ohio Ops.3d 26 (App., pp. 57(a)-81(a)). The opinion of the Court of Common Pleas of Hamilton County, Ohio is unreported (App., pp. 89(a)-417(a)).

JURISDICTION

The judgment of the Ohio Supreme Court (App., p. 56(a)) was entered on June 13, 1979. Petitioners' timely petition for rehearing was denied on July 18, 1979 (App., p. 27(a)). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

[1] The respondents are the Superintendent of Public Instruction for The State of Ohio, The State Board of Education, The State Department of Education and The Controlling Board.

QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment to the United States Constitution was violated by the Ohio Supreme Court when, in reversing the judgment of the lower Ohio courts that the Ohio statutory plan for financing public education violates the Ohio Constitution, it ignored the trial court's affirmed findings of fact and devised its own contrary findings of fact, thus violating its long standing rule of accepting findings of fact, unless *no* evidence exists to support them.

2. Whether the equal protection clause of the Fourteenth Amendment to the United States Constitution was violated by the Ohio Supreme Court when, in such case, it ignored the affirmed findings of fact, and devised its own contrary findings of fact thus violating its long standing rule of accepting findings of fact, unless *no* evidence exists to support them.

3. Whether the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution was violated by the Ohio Supreme Court when, in such case, it ignored the affirmed findings of fact and devised its own contrary findings of fact, thus violating its long standing rule of accepting findings of fact, unless *no* evidence exists to support them.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process, equal protection and privileges and immunities guarantees of the Fourteenth Amendment to the United States Constitution. They provide that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

In reversing a judgment in favor of the plaintiffs in an action challenging the constitutionality of Ohio's statutory plan for financing public elementary and secondary education, the Supreme Court of Ohio ignored all of the trial court's affirmed findings of fact and, in lieu thereof, constructed its own controlling statements of fact which are in direct and irreconcilable conflict with those findings.

The petitioners herein, The Board of Education of the City School District of the City of Cincinnati, the individual members of that board, the superintendent and clerk-treasurer of the Cincinnati schools and several students who reside in the Cincinnati school district and their parents, filed a declaratory judgment action in the Hamilton County Court of Common Pleas alleging that Ohio's system for financing public elementary and secondary education violates the equal protection clause and the thorough and efficient clause of the Ohio Constitution.[2]

After a trial consisting of 77 separate trial days during which the petitioners called 70 witnesses and the respondents 22 witnesses, the trial court ruled for the petitioners and adopted the 908 Findings of Fact and 35 Conclusions of Law submitted by them. The trial court, in its Findings of Fact (App., pp. 89(a)-379(a)), found that conditions of fiscal destitution and educational deprivation are pervasive throughout the school districts of Ohio (Findings VII (F)(3), VII (G)(1), VII (I)(1.1) - (1.5); App., pp. 153(a)-197(a)). In all but the few school districts in Ohio which are favored by an abundance of property wealth or income wealth or both, Ohio schools are in generally desperate straits (Finding VIII-II (A)(84); App., pp. 283(a)-284(a)). Many districts were forced to close their schools in 1976, 1977 and 1978 for lack of funds (Findings VII (B)(3), (C)(4); App., pp. 133(a)-140(a)). Many of the districts which avoided closing in 1978 were unable to deliver better than austerity levels of education (Findings VII (F)(1), (I)(1.1) and (1.5); App., pp. 154(a), 195(a)-197(a)).

The trial court also found that only a small minority of the schools in Ohio are able to comply with state minimum standards (Finding VII (A)(13); App., p. 131). The quantity and quality of the educational services provided by the districts which serve the overwhelming majority of Ohio's school children are vastly inferior to those which are delivered by the favored few districts (Finding VII (H)(1); App., p. 180 (a)).

And for a multiplicity of reasons, the property tax component of the Ohio school finance system has undergone a general statewide collapse (Findings VIII-I (A)(1) - (8); App., pp. 248(a)-254(a)). The state funds that are disbursed to the districts fall pitifully short of compensating for the failure of property taxation to generate sufficient revenue to finance the school districts adequately (Findings VIII-I (A)(2) and VIII-II (A)(5.3); App., pp. 248(a), 269(a)). To make matters worse, the state disburses extra funds to the districts which need them the least and withholds funds from the districts which need them the most (Findings VIII-II (C)(6.3), (F)(7) and (B)(3), (4), (5) and (6); App., pp. 329(a), 336(a)-337(a), 319(a)-320(a)). Many districts, including the Cincinnati City School District, are utterly ruined by the present system (Finding V (1) - (18); App., pp. 115(a)-123(a)).

The Court of Common Pleas thus held the Ohio system for financing public elementary and secondary education to be violative of both the equal protection and thorough and efficient clauses of the Ohio Constitution.

The Court of Appeals for Hamilton County, Ohio affirmed the trial court's ruling that the Ohio system of school financing

---

[2] Article I, § 2 of the Ohio Constitution provides in part that "government is instituted for their [the public's] equal protection and benefit . . ."

Article VI, § 2 of the Ohio Constitution provides in part that "[t]he General Assembly shall make such provisions, by taxation, or otherwise, as, . . . will secure a thorough and efficient system of common schools throughout the State."

violates the equal protection clause of the Ohio Constitution, and reversed its ruling that the system violates the thorough and efficient clause of the Ohio Constitution. The Court of Appeals, however, affirmed and adopted all of the trial court's findings of fact (App., p. 75(a)).

Upon appeal, the Ohio Supreme Court ruled that Ohio's school financing system does not violate either the equal protection clause or the thorough and efficient clause of the Ohio Constitution. In its ruling, however, that Court formulated controlling statements of fact which are in direct and irreconcilable conflict with the Common Pleas Court's affirmed findings of fact.

REASONS FOR GRANTING THE WRIT

This case squarely presents an important question of federal constitutional law, the ultimate resolution of which will safeguard the procedural rights of countless litigants. May the court of last resort of a state disregard the affirmed and unchallenged findings of fact made by a trial court in reversing a judgment predicated upon these findings?

I. THE OHIO SUPREME COURT VIOLATED ITS OWN CUSTOMARY PROCEDURAL RULE AND IN SO DOING DEPRIVED THE PETITIONERS OF RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In this case the Ohio Supreme Court violated its own long established procedural rule that no court of review is permitted to substitute its judgment on issues of fact for that of the trier of facts. *Gates* v. *Board of Education*, 11 Ohio St. 2d 83, 86 (1967). Indeed, that Court has specifically stated on numerous occasions that "where similar factual findings are made by the Court of Common Pleas and the Court of Appeals on appeal they must be accepted by this Court unless there is *no* evidence of probative value to support them".

Gillen-Crow Pharmacies, Inc. v. *Mandzak*, 5 Ohio St. 2d 201, 205 (1966).[3]

In deciding this case, however, the Ohio Supreme Court did not accept the facts and the weight of the evidence as found by the two lower courts, but rather ignored the affirmed findings of fact. The decision of the Ohio Supreme Court is based upon numerous factual assertions which are in direct conflict with the trial court's affirmed findings of fact. Those findings, which were based upon the trial judge's evaluation of the credibility of the numerous witnesses and upon his weighing of the evidence, are fully supported by the record. The respondents have never disputed this.

The Ohio Supreme Court's violation of its long-standing rule of practice has deprived the petitioners of federal constitutional rights guaranteed by the due process of law clause, the equal protection of law clause and the privileges and immunities clause of the Fourteenth Amendment. This deprivation of the federal constitutional rights of the petitioners by the Ohio Supreme Court's arbitrary decision to cast aside its own stated rule of practice impels this Court to grant the petitioners' writ of certiorari.[4]

---

[3] See also, *G.S.T.* v. *Avon Lake*, 48 Ohio St. 2d 63 (1976); *In re Estate of Duiguid*, 24 Ohio St. 2d 137 (1970); *State ex rel. Pomeroy* v. *Webber*, 2 Ohio St. 2d 84 (1965); *Jaffrin* v. *DiEgidio*, 152 Ohio St. 359 (1949); *Union Properties, Inc.* v. *Cleveland Trust Co.*, 152 Ohio St. 430 (1949); *McKellips* v. *Industrial Comm. of Ohio*, 145 Ohio St. 79 (1945); *In re Estate of Lawry*, 140 Ohio St. 223 (1942); *State ex rel. Kobelt* v. *Baker*, 137 Ohio St. 337 (1940); *Peer* v. *Industrial Comm. of Ohio*, 134 Ohio St. 61 (1938); *State ex rel. Puehler* v. *Board of Educ.*, 134 Ohio St. 280 (1938); *Maus* v. *Auglaize Bank*, 125 Ohio St. 32 (1932); *F.W. Woolworth Co.* v. *Kinney*, 121 Ohio St. 462 (1929); *Hamilton* v. *Dilley*, 120 Ohio St. 127 (1929); *Katz* v. *American Finance Co.*, 112 Ohio St. 24 (1925); *McNab* v. *Board of Park Comm.*, 108 Ohio St. 497 (1923); *Sutter* v. *State ex rel. Maul*, 108 Ohio St. 309 (1923); *Ohio Collieries Co.* v. *Cocke*, 107 Ohio St. 238 (1923); *Taylor* v. *Flower Deaconess Home and Hospital*, 104 Ohio St. 61 (1922); *Foster* v. *Scottish Union & Natl. Ins. Co.*, 101 Ohio St. 180 (1920).

[4] The provisions of the Federal Constitution are the supreme law of the land and no right granted or secured by the United States Constitu-

Petitioners have not been afforded appellate review of the decision of the Ohio Supreme Court. Their timely motion for rehearing was summarily denied by the Ohio Supreme Court. There is no appellate court, other than this Court, to which petitioners can turn for redress of the violations of their federal constitutional rights by the Ohio Supreme Court.

A. The Ohio Supreme Court's Conclusion That Ohio's School Financing System Is Not Violative Of The Equal Protection Clause Of The Ohio Constitution Is Predicated Upon Misstatements Of Fact Which Are At Absolute Variance With The Common Pleas Court's Findings Of Fact.

The Ohio Supreme Court's conclusion that Ohio's school financing system comports with the Ohio Constitution's Equal Protection guarantee rests upon that Court's erroneous conclusory assessment that the General Assembly's educational financing plan operates uniformly among school districts, enables all schools to comply with state minimum standards which assure an education "of high quality", and does not deny an adequate educational opportunity to any child in the state, and that the wealth-based disparities in educational opportunity which exist under the system are justified because the system preserves the principle of local citizen control of educational decision-making. The affirmed findings of fact which the trial court made based upon the evidence refute each of those considerations in its entirety. These affirmed findings are that the system operates capriciously and unfairly among school districts, has placed almost all of Ohio's schools

---

tion can be impaired in any manner by a law or pronouncement of any manner by a law or pronouncement of a state governmental agency. *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902). Any state practice, no matter how clearly within a state's acknowledged power, which interferes with or is contrary to the United States Constitution, must yield. *Free* v. *Bland*, 369 U.S. 663, 666 (1962); Article VI, Clause 2, United States Constitution.

in such financial distress that they are unable to comply with the State's minimum standards (which represent the lowest tolerable level of education), and denies adequate educational opportunity to a majority of Ohio's school age children; and that "local control" of education does not exist to any meaningful degree except in a few financially-favored districts.

The irreconcilable conflict described above between the Ohio Supreme Court's factual conclusions and the trial court's findings of fact is illustrated by the ensuing comparison of certain pivotal statements from the Ohio Supreme Court's majority opinion and the findings of fact applicable to the issues which are the subject of those statements.

(1.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Number Of Dollars Guaranteed By The Present System Is So Inadequate As To Render Almost All Of Ohio's Schools Unable To Comply With The State's Minimum Standards For Ohio Schools.

THE OHIO SUPREME COURT:

The number of dollars guaranteed per pupil at the 20 mill level has been determined by the Education Review Committee [Committee of the Ohio General Assembly] to be sufficient to assure that all school districts are given the means to comply with the State Board of Education Minimum Standards, which describe a program of "high quality" pursuant to R.C. [Ohio Revised Code] 3301.07(D). (58 Ohio St. 2d at 382, App. p. 42(a)).

THE FINDINGS OF FACT:

[A]lmost 97% of the 1,869 schools which were inspected were found not to be in compliance with one or more separate standards. (Finding VII (A)(7), App. p. 130(a)).

Specifically, the reports indicated the following lack of compliance with various state standards: 53% of the buildings were found to be deficient in curriculum and instruction; 63% in staff and personnel; 14% in pupil-teacher ratios; 29% in libraries; 54% in textbooks; 34% in classroom facilities; 45% in library facilities; 47% in art, music and industrial education facilities; 31% in physical education facilities. (Finding VII (A)(8), App. p. 130(a)).

The significance of the evidence of non-compliance by schools with state minimum standards is that the General Assembly has established a system of common schools throughout the state in which the overwhelming majority of the schools are substandard as measured by the state's own criteria. (Finding VII (A)(15), App. p. 132(a)).

(2.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That Disparities In Educational Opportunity Based Upon Property Wealth, As Well As Disparities Based Upon Tax Rates, Continue To Exist Among Ohio's School Districts Under The Equal Yield Formula.

THE OHIO SUPREME COURT:

Its [the "Equal Yield" formula's] objective is to equalize the property wealth base upon which the school districts raise operating revenue through the levy of voter-approved taxes . . . . (58 Ohio St. 2d at 371, App. p. 31(a)).

THE FINDINGS OF FACT:

Its objective *purports* to be that of "equalizing" the property wealth bases upon which the school districts raise operating revenue through the levy of voter-approved taxes . . . . (Finding IV (2), App. p. 105(a)). (Our emphasis).

The system does not equalize the ability of school districts to increase school millage rates, however. Nor does it purport to equalize the income wealth of the residents of school districts. Indeed, the "reward for effort" element operates to enlarge the disparities in school operating revenues which exist among the districts based upon their different tax rates and differing taxing abilities. Because the formula establishes an arbitrary property wealth ceiling of $48,000 per pupil, which is lower than the tax duplicates of some of the districts, disparities in educational opportunity based upon property wealth, as well as disparities based upon tax rates, continue to exist among Ohio's school districts. (Finding IV (3), App. p. 105(a)).

(3.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Equal Yield Formula Does Not Assure Each School District An Equal Number Of Dollars For Each Mill Levied Up To Thirty Mills, Regardless Of The Property Wealth Of The District. Indeed, Millage Variations Explain Only 41% Of The Variations In Guaranteed Yield, Leaving 59% Of The Variations To Be Occasioned By Other Factors, Principally Property Values.

THE OHIO SUPREME COURT:

The Equal Yield Formula assures that each school district will receive an equal number of dollars for each mill levied up to 30 mills, regardless of the property wealth of the district. (58 Ohio St. 2d at 382, App. p. 42(a)).

THE FINDINGS OF FACT:

In a district power equalizing (DPE) formula which operates properly and achieves equal yield for equal effort, variations in the guaranteed yield (basic aid plus local revenues) should result from, and correlate directly with, variations in millage. (Finding VIII-II (B)(7), App. p. 321(a)).

But Ohio's DPE formula is not effective for even this purpose. Guaranteed yield is influenced by factors other than millage to such an extent that even at full funding the system is, to a great extent, haphazard. (Finding VIII-II (B)(8), App. p. 321(a)).

[E]ven at full funding, millage variations explain only 41% of the variations in guaranteed yield, leaving 59% of the variations to be occasioned by other factors. (Finding VIII-II (B)(15), App. p. 322(a)).

These other factors include mandates, save-harmless, local yield above the guaranteed level, actual v. equalized mills and most significantly, property values. (Finding VIII-II (B)(16), App. p. 322(a)).

(4.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Only Boards Of Education In Ohio Which Have Any Degree Of Local Control Over Educational Decisions Are Those In A Few Well Financed School Districts; That In The Great Majority Of School Districts Local Control Of Education Is Non-existent.

THE OHIO SUPREME COURT:

In addition to allowing people within a school district to determine how much money they are willing to devote to education, local control allows for local participation in the

decision-making process that determines how these local tax dollars will be spent. Each school district can develop programs to meet perceived needs. (58 Ohio St. 2d at 380, App. p. 41(a)).

THE FINDINGS OF FACT:

The Court finds from the testimony of numerous superintendents and board members that under the present system of financing public education, the only boards of education in Ohio which have any degree of local control over educational decisions are those boards in a few well-financed school districts. In the great majority of school districts, financial constraints and legal mandates have limited school board options and have very severely curtailed the power of boards of education to make important educational decisions. (Finding XI (1), App. p. 375(a)).

B. The Ohio Supreme Court's Conclusion That The School Financing Plan Does Not Violate The Command Of The Ohio Constitution's Thorough And Efficient Clause Because No School District Receives So Little Local And State Revenue That The Students Are Effectively Being Deprived Of Educational Opportunity Is Demonstrably Contrary To The Comprehensive Findings Of The Trial Court Founded Upon The Massive Record In This Case.

It is clear from the opinion of the Ohio Supreme Court that that Court's holding that Ohio's system for financing elementary and secondary education is not violative of the Ohio Constitution's thorough and efficient clause, as construed in *Miller* v. *Korns*, 107 Ohio St. 287 (1923), rests upon the majority's incorrect conclusion that the system does not place any school district in such financial destitution that the students therein are effectively deprived of educational oppor-

tunity, that the equal yield formula ensures each child an adequate education, and that even the school closings that occur under the Ohio system are educationally innocuous. Each of those conclusions is contrary to specific and comprehensive findings made by the Common Pleas Court. As we demonstrate herein, the trial court found that so many of the school districts in Ohio are underfunded that a majority of Ohio's school children are being denied educational opportunity, and that school closings have an irreparably harmful educational and psychological effect upon school children.[5]

It was massive proof which gave rise to the trial court's hundreds of separate findings of fact concerning the nature and extent of educational deprivation which exists throughout Ohio as a direct result of the present school financing system. We request that this Court grant certiorari in order to require the Ohio Supreme Court to apply its own practice to the findings of the court below. If required to do so, it would be compelled to hold that the Equal Yield Formula's guarantee at 20 mills *is not* sufficient to ensure that each child receives an adequate education, and it would perforce have to conclude that the Ohio school financing system violates the thorough and efficient clause of the Ohio Constitution.

---

[5] The petitioners' proof of widespread educational deprivation was so comprehensive that on three separate occasions respondents' counsel objected to the petitioners calling any further witnesses to testify to it on the ground that such evidence had become cumulative. In order to show the depth and breadth of the educational damage which the present system has brought to school children throughout Ohio, the petitioners interrogated more than forty witnesses who testified to educational deprivation which exists in twenty four specific districts in the state, and showed, moreover, that because of the uniformity of inadequate funding in the majority of Ohio's school districts, submarginal educational conditions are pervasive throughout the state.

(1.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That Conditions Of Educational Deprivation Are Pervasive Throughout A Majority Of Ohio's School Districts And That The Present System Falls Far Short Of Delivering To The School Districts Sufficient Resources To Enable Them To Provide A Satisfactory Level Of Education To The Overwhelming Majority Of Ohio's School Children.

THE OHIO SUPREME COURT:

This court, therefore, intimated in *Miller* v. *Korns, supra,* that the wide discretion granted to the General Assembly is not without limits. For example, in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity, such a system would clearly not be thorough and efficient. (58 Ohio St. 2d at 387, footnote omitted, App. p. 48(a)).

• • •

To the extent that the Equal Yield Formula's guarantee at 20 mills is sufficient to ensure that each child receives an adequate education, the system devised by the General Assembly is constitutional. . . . (58 Ohio St. 2d at 387-88, App. p. 48(a)).

THE FINDINGS OF FACT:

Financial resources are so limited in the closing audit districts that in none of those districts are the children receiving more than barely minimal educational opportunities. The superintendents of those districts described the educational programs they are able to provide as "just able to get by" and below state minimum standards, "barely adequate", not having enough money "to carry on an educational program",

lacking "severely in the quality level", not allowing each child to exploit his individual talents to the fullest, "the bare minimum . . . just enough to be chartered". (Finding VII (E)(1), App. p. 142(a)).

In the case of each of the districts so disadvantaged, the conditions are the direct result of a severe shortage of funds. (Finding VII (E)(2), App. p. 143(a)).

The plaintiffs showed with documentary and statistical evidence and with expert testimony that in all likelihood the conditions of educational deprivation which exist in the audit districts also exist in all of the districts in the state which fall in the same range of dollars per pupil as do the audit districts. The number of districts which are similarly limited financially is 377. They comprise over 60% of the districts in the state. Eight hundred ninety-five thousand students are enrolled in those districts. (Finding VII (F)(1), App. p. 154(a)).

From the above evidence, the Court concludes that conditions of widespread educational deprivation which the testimony of the superintendents showed to exist in the closing audit districts, exist throughout more than half of the school districts in this state. (Finding VII (F)(3), App. p. 159(a)).

The school children who are enrolled in those districts which had total state and local support of less than $1000 per pupil in 1975-76, received substandard educational services that year (Finding VII (F)(2.6), App. p. 156(a)) and may be presumed to be receiving substandard educational services at the present time since school district costs are escalating at a greater rate than are school district revenues. (Finding VI(C)(7), App. p. 128(a)). Sixty-two percent of Ohio's students were enrolled in districts which had less than $1100 per pupil in total state and local support in 1975-76 and they may similarly be presumed to be currently receiving educational services of the same level they received in 1975-76. (Finding VI(A)(14), App. p. 125(a)).

[T]he Court concludes that a substantial majority of Ohio's pupils (the 62% enrolled in the districts which had less than $1100 total support per puil in 1975-76) are presently receiving less than adequate educational services and opportunities. (Finding VII (I)(1.1), App. p. 195(a)).

[I]t is clear that the school districts in this state generally fall far short of having sufficient resources to provide a satisfactory level of education to the overwhelming majority of Ohio's school children, and the Court so finds. Moreover, the present finance system falls far short of funding a system of public schools which can comply with the State Board of Education's minimum standards. That fact alone supports the finding that, by and large, the school children in Ohio are getting educationally shortchanged. (Finding VII (I)(1.5), App. p. 197(a)). (Our emphasis).

(2.) Contrary To The Ohio Supreme Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The School Closings That Occur Under The Present System Bring Irreparable Educational Harm To The Affected Students.

THE OHIO SUPREME COURT:

[P]laintiffs attempt to equate school closings with "educational deprivation," . . . . (58 Ohio St. 2d at 288, App. p. 49(a)). .

THE FINDINGS OF FACT:

All of the children deprived of schooling as a result of school closings suffered educational losses. The educational development of the children was affected because a loss of a day of instruction can never be recaptured. Finding VII (D)(1), App. p. 141(a)).

II. THE JUDGMENT OF THE OHIO SUPREME COURT VIOLATES FUNDAMENTAL FEDERAL CONSTITUTIONAL RIGHTS OF THE PETITIONERS.

A. The Ohio Supreme Court's Decision Violates The Federal Due Process Rights Of The Petitioners.

It is axiomatic that the Ohio Supreme Court is constitutionally required to provide due process of law in accordance with the mandates of the Fourteenth Amendment. Due process of law is an evolving concept, the importance of which has been described by this Court as follows:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.
>
> *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971).

Due process of law has been variously defined to mean "fair procedure,"[6] "fair, right and just" procedures,[7] and "fundamental fairness in the light of the total circumstances".[8] Citizens are entitled to due and regular process not only in the pleading, hearing and consideration of their litigated claim, but also in the *disposition* of their litigated claim.[9]

---

[6] *Poe* v. *Charlotte Memorial Hospital, Inc.*, 374 F. Supp. 1302, 1311 (W.D. N.C. 1974) (3 Judge Court).

[7] "Due process is that which comports with the deepest notions of what is fair and right and just." *Solesbee* v. *Balkan*, 339 U.S. 9, 16 (1950) (Frankfurter, J. dissenting).

[8] *Whitfield* v. *Simpson*, 312 F. Supp. 889, 874 (E.D. Ill. 1970) (3 Judge Court); *Buttny* v. *Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968).

[9] *Martin* v. *Neuschel*, 396 F. 2d 759, 760 (3rd Cir. 1968).

Generally, due process does not require that a state provide for appellate review of civil cases. However, where the state does provide a means of appeal, the appeal process which is created "must be exercised without discrimination".[10] Such discrimination occurs in violation of the Fourteenth Amendment when a case between litigants is arbitrarily decided by a court "in violation of settled principles of law and contrary to undisputed facts".[11]

This Court has stated that in the review of a criminal case on appeal:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case at it was tried and *as the issues were determined in the trial court.* [Our emphasis]
>
> *Cole* v. *Arkansas*, 333 U.S. 196, 202 (1948).

The petitioners submit that the Ohio Supreme Court's action in arbitrarily choosing not to follow its long-standing practice not to substitute its judgment as to findings of fact for that of the trier of fact constitutes a discriminatory disposition of their claims in violation of the due process clause of the Fourteenth Amendment.

---

[10] *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 43 (1954). *Accord, Oppenheimer* v. *Roth*, 468 F.2d 901, 902 (9th Cir. 1972); *In re Brown*, 439 F.2d 47, 51 (3rd Cir. 1971) (en banc); *Compton* v. *Naylor*, 392 F. Supp. 575, 578 (N.D. Tex. 1975) (3 Judge Court).

[11] *Williams* v. *Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940), *citing, Postal Telegraph Cable Co.* v. *Newport, Ky.*, 247 U.S. 464 (1918).

B. The Effect Of The Ohio Supreme Court's Decision Is That Of Denying The Petitioners Access To The Courts.

The right to meaningful access to the courts of a state is a fundamental right protected by the due process[12] and privileges and immunities[13] clauses of the Fourtenth Amendment. The right to meaningful access to the courts has always meant that all litigants will have like access and equal treatment by the courts. As early as 1885, this Court stated that all persons

> . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . .
>
> *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885).[14]

Petitioners submit that their right to like and meaningful access to the courts and equal treatment by those courts was denied when the Ohio Supreme Court arbitrarily imposed a different rule of practice upon them than upon all other litigants.

---

[12] *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974); *Procunier* v. *Martinez*, 416 U.S. 396, 419 (1974); *Moeck* v. *Zajackowski*, 541 F.2d 177, 180 (7th Cir. 1976); *Silver* v. *Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Hall* v. *Maryland*, 433 F. Supp. 756 (D. Md. 1976); *Hooks* v. *Wainwright*, 352 F. Supp. 163, 167 (M.D. Fla. 1972).

[13] *Angel* v. *Bullington*, 330 U.S. 183, 188 (1947); *Broderick* v. *Rosner*, 294 U.S. 629, 642 (1935); *Canadian Northern R. Co.* v. *Eggen*, 252 U.S. 553, 560 (1920); *Slaughter-House Cases*, 83 U.S. 394, 409 (1872); *Crandall* v. *Nevada*, 73 U.S. 744, 747 (1867). *See also*, *Corfield* v. *Coryell*, 6 Fed Cases 3230 (1823).

[14] *See also*, *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907):

C. The Ohio Supreme Court Denied The Plaintiffs The Equal Protection Of The Laws.

The equal protection clause of the Fourteenth Amendment prohibits a State from drawing a legal line which constitutes an invidious discrimination against a particular class of citizens. *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In determining whether a state-established classification violates the equal protection clause, the court must decide whether duties or burdens different from those resting upon the general public are cast upon the class. *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U.S. 96, 104-105 (1899).

While the Ohio Supreme Court decided that the school children in Ohio do not have a fundamental right to an education, nonetheless, those children do have a legitimate entitlement to a public education as a property interest which is protected by the Fourteenth Amendment. *Goss* v. *Lopez*, 419 U.S. 565, 573-74 (1975). In addition, those children have a fundamental constitutional right to like and meaningful access to the courts and to equal treatment by the courts. The equal protection clause, while not affording a litigant a right of appeal, does guarantee that if an appellate process is provided all litigants are to be treated alike. *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972); *Javits* v. *Stevens*, 382 F. Supp. 131, 140 (S.D. N.Y. 1974). Indeed, this Court has ruled that state courts that apply a rule of procedure in a discriminatory manner run afoul of the Fourteenth Amendment. *Douglas* v. *California*, 372 U.S. 353 (1963).

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States but is granted and protected by the Federal Constitution.

The Ohio Supreme Court's decision in this case created two classes of litigants. Heretofore, all litigants in Ohio were treated alike in that unless no evidence existed to support a trial court's finding, the reviewing court could not substitute its judgment as to a finding of fact for that of the trier of facts. The Ohio Supreme Court's failure to apply that same rule to the present litigants is an act of invidious discrimination against those litigants which violates their constitutional right to equal protection of the laws.

CONCLUSION

In his famous dissenting opinion in *Northern Securities Company* v. *United States*, 193 U.S. 197, 400-2 (1903) (Holmes, J. dissenting), Justice Holmes laid down a principle of judicial behavior which should have guided the Ohio Supreme Court to apply its customary procedure of adhering to the trial court's findings of fact, even in this case of overriding political consequence:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of *some accident of overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law will bend.* [Our emphasis]

In deciding such a case, as this one is, a court should proceed in the same manner as if it were deciding a routine case, in Holmes' words, "with the same natural and spontaneous interpretation that one would be sure of if the question arose upon an indictment for a similar act which excited no public attention, and was of importance only to the prisoner before the court".

Thus, in reviewing the judgments of the courts below, the Ohio Supreme Court was obligated to accept the finding of the Common Pleas Court that "the school districts in this state generally fall short of having sufficient resources to provide a satisfactory level of education to the overwhelming majority of Ohio's school children" as it would accept the finding of a trial court in an automobile accident case that a defendant was driving his vehicle 90 miles an hour through a crowded intersection.

In upholding the Ohio system for financing elementary and secondary education, the Ohio Supreme Court not only

cast aside evolving, enlightened principles of state constitutional law and consigned the rights of Ohio's schoolchildren to a constitutional limbo, it violated its own time-honored practice of adhering to the affirmed findings of fact of the Court of Common Pleas. That is the import of dissenting Justice Locher's statement that, "the majority opinions flies square in the face of reality, not to mention the findings of fact and conclusions of law of the trial court and the Court of Appeals". (58 Ohio St. 2d at 391, App. p. 52(a)).

In deciding this case in that manner, the Ohio Supreme Court violated the federal constitutional rights of the plaintiffs. Only this Court can rectify the violation of these federal rights. The Fourteenth Amendment rights of an infinite number of state court litigants are at stake. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN A. LLOYD, JR.
NANCY A. LAWSON

610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202
513/381-7200

COUNSEL FOR PETITIONERS

October 15, 1979

APPENDIX

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS
OF HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

Case No. 78-1284

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.

Appellees and Cross-Appellants,

v.

FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION STATE OF OHIO, et al.

Appellants and Cross-Appellees.

MOTION FOR REHEARING

(Filed June 25, 1979)

WILLIAM J. BROWN,
ATTORNEY GENERAL

DAVID H. BEAVER
HENRY A. ARNETT

State Office Tower
Fifteenth Floor
30 East Broad Street
Columbus, Ohio 43215
614/466-2980

ATTORNEYS FOR
APPELLANTS AND
CROSS-APPELLEES

JOHN A. LLOYD, JR.
NANCY A. LAWSON

610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202
513/381-7200

ATTORNEYS FOR
APPELLEES AND
CROSS-APPELLANTS

Appellees and Cross-Appellants hereby move for a rehearing pursuant to Supreme Court Rule IX, Section 1, on the ground that, in deciding this case, the Court formulated controlling statements of fact which are in direct and irreconcilable conflict with the Common Pleas Court's affirmed findings of fact.

As demonstrated in the brief in support of this motion, the Court departed from its time-honored practice and, in so doing, violated the rights of the plaintiffs conferred by the United States Constitution.

The Appellees and Cross-Appellants ask the Court to schedule this motion for argument so as to afford the plaintiffs a fair opportunity to bring the Court's error to the attention of all of the justices.

/s/ JOHN A. LLOYD, Jr.
NANCY A. LAWSON

610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202
513/381-7200

ATTORNEYS FOR APPELLEES
AND CROSS-APPELLANTS

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS
OF HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

Case No. 78-1284

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF
CINCINNATI, et al.

Appellees and Cross-Appellants,

v.

FRANKLIN B. WALTER, SUPERINTENDENT
OF PUBLIC INSTRUCTION,
STATE OF OHIO, et al.

Appellants and Cross-Appellees.

BRIEF IN SUPPORT OF
MOTION FOR REHEARING

[TABLE OF CONTENTS AND AUTHORITIES OMITTED]

I. Introduction

This motion for rehearing is designed to direct the Court's attention to an error which the Court made in reviewing this case and to afford it an opportunity to correct that error. The Court's decision upholding the constitutionality of Ohio's school financing system rests upon certain contrived assertions of fact which directly contradict the Common Pleas Court's affirmed findings of fact supported by the massive record.

In deciding this case in that manner, this Court violated its own traditional rules of procedure as well as the federal constitutional rights of the plaintiffs to have equal treatment by the courts in the disposition of their litigated claims.

This motion is appropriate under the test which the Court has established for determining the appropriateness of motions for rehearing. "The very purpose of providing for any application for rehearing is to correct mistakes by this court which counsel could not have reasonably anticipated before the court's decision." *Grandle* v. *Rhodes,* 166 Ohio St. 197, 200 (1957) (Taft, J, concurring.) Under no set of circumstances could counsel have anticipated that the Court would decide this case on the basis of factual formulations which are contrary to the trial court's abundant findings of fact. Thus, the propriety of this motion is beyond dispute.

II. This Court Failed To Accept The Unchallenged, Affirmed Findings Of Fact Made By The Court Of Common Pleas Based Upon The Massive Proof Adduced By The Plaintiffs.

In upholding the Ohio system for financing elementary and secondary education, this Court's majority violated its own time-honored practice of adhering to the findings of fact of the Court of Common Pleas. A careful examination of the majority's opinion disloses a sequence of statements of fact which are ineluctably contrary to the affirmed, and indeed unchallenged, findings of fact of the Court of Common Pleas. In so doing, the Court violated the practice of this Court that findings of the trier of fact are overturned only when no support exists in the record. *Gates* v. *Board of Education,* 11 Ohio St. 2d 83 (1967).

Moreover, in departing from its usual and customary procedure for appellate review, this Court violated the plaintiffs' rights guaranteed by both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Thus, in its anxiety to decide this case for the defendants under the Ohio Constitution, the Court violated the rights of the plaintiffs under the United States Constitution. The Court can and should redress that violation on rehearing.

The plaintiffs' motion for rehearing should be set down for argument so that the plaintiffs are accorded a fair opportunity to bring to the Court's attention the gravity of its error.

(A.) The Court's Conclusion That The School Financing System Is Not Violative Of The Ohio Equal Protection Clause Of the Ohio Constitution Is Predicated Upon Misstatements Of Fact Which Are At Absolute Variance With The Common Pleas Court's Findings Of Fact.

This Court's conclusion that the system comports with the Ohio Constitution's Equal Protection guarantee rests upon the Court's erroneous conclusory assessment that the General Assembly's educational financing plan operates uniformly among school districts, enables all schools to comply with state minimum standards which assure an education "of high quality", and does not deny an adequate educational opportunity to any child in the state, and that the wealth-based disparities in educational opportunity which exist under the system are justified because the system preserves the principle of local citizen control of educational decision-making. The affirmed findings which the trial court made based upon the evidence refute each of those considerations in its entirety. These findings are that the system operates capriciously and unfairly among school districts, has placed almost all of Ohio's schools in such financial distress that they are unable to comply with the State's minimum standards which themselves represent not an education of high quality but the lowest tolerable level of education, and denies adequate educational opportunity to a majority of Ohio's school age children; and that "local control" of education does not exist to any meaningful degree except in a few financially-favored districts.

The irreconcilable conflict described above between this Court's statements and the trial court's findings of fact is

illustrated by the ensuing comparison of certain pivotal statements from the majority's opinion and the findings of fact applicable to the factual issues which are the subject of those statements.

(1.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Only Boards of Education In Ohio Which Have Any Degree Of Local Control Over Educational Decisions Are Those In A Few Well Financed School Districts; That In The Great Majority of School Districts Local Control Of Education Is Non-existent.

THIS COURT:

> In addition to allowing people within a school district to determine how much money they are willing to devote to education, local control allows for local participation in the decision-making process that determines how these local tax dollars will be spent. Each school district can develop programs to meet perceived needs. 58 Ohio St. 2d at 380.

THE FINDINGS OF FACT:

The Court finds from the testimony of numerous superintendents and board members that under the present system of financing public education, the only boards of education in Ohio which have any degree of local control over educational decisions are those boards in a few well-financed school districts. In the great majority of school districts, financial constraints and legal mandates have limited school board options and have very severely curtailed the power of boards of education to make important educational decisions. (Finding XI (1)).

(2.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Number Of Dollars Guaranteed By The Present System Is So Inadequate As To Place Almost All Of Ohio's Schools In The Condition Of Inability To Comply With The State's Minimum Standards For Ohio Schools.

THIS COURT:

> The number of dollars guaranteed per pupil at the 20 mill level has been determined by the Educational Review Committee to be sufficient to assure that all school districts are given the means to comply with the State Board of Education Minimum Standards, which describe a program of "high quality" pursuant to R.C. 3301.07(D). 58 Ohio St. 2d at 382.
>
> • • •
>
> The "Equal Yield Formula" attempts to establish a funding floor, at 20 mills, that is sufficient to assure that each school district has the means to comply with state minimum standards. 58 Ohio St. 2d at 388.

THE FINDINGS OF FACT:

[A]lmost 97% of the 1,869 schools which were inspected were found not to be in compliance with one or more separate standards. (Tr. 3119). (Finding VII (A)(7)).

Specifically, the reports indicated the following lack of compliance with various state standards: 53% of the buildings were found to be deficient in curriculum and instruction; 63% in staff and personnel; 14% in pupil-teacher ratios; 29% in libraries; 54% in textbooks; 34% in classroom facilities; 45% in library facilities; 47% in art, music and industrial education facilities; 31% in physical education facilities. (Plaintiffs' Exh. 165). (Finding VII (A)(8)).

Every single elementary school which was inspected was found to be in violation of at least three minimum standards.

Only 18% of the elementary schools were found not to be in violation of a physical facility requirement. Only 24 of the 986 secondary schools were found not to be in violation of the standards. These facts were acknowledged by State Assistant Superintendent of Public Instruction G. Robert Bowers. (Tr. 6712). (Finding VII(A)(12)).

The condition of widespread non-compliance with state minimum standards by Ohio schools demonstrates that most of the schools in the state *are not able to conform* to the "sound educational practices" standard expressed by the Department of Education and thus are not technically eligible for chartering. (Finding VII (A)(13)). (Our emphasis).

Thus, based upon the Department of Education's reports, the schools in Ohio are not in compliance with the State Board's minimum standards and must be regarded as submarginal by the State's own standards. It is beyond dispute that the minimum standards represent the lowest level at which instructional services should be provided in Ohio. William A. Harrison, Staff Director to the General Assembly's Education Review Committee, a witness called by the defendants, conceded that this is so. (Tr. 4956). (Finding VII (A)(14)).

The significance of the evidence of non-compliance by schools with state minimum standards is that the General Assembly has established a system of common schools throughout the state in which the overwhelming majority of the schools are substandard as measured by the state's own criteria. (Finding VII (A)(15)).

(3.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That Disparities In Educational Opportunity Based Upon Property Wealth, As Well As Disparities Based Upon Tax Rates, Continue To Exist Among Ohio's School Districts Under The Equal Yield Formula.

THIS COURT:

> Its [the "Equal Yield" formula's] objective is to equalize the property wealth base upon which the school districts raise operating revenue through the levy of voter-approved taxes . . . . 58 Ohio St. 2d at 371.

THE FINDINGS OF FACT:

Its objective *purports* to be that of "equalizing" the property wealth bases upon which the school districts raise operating revenue through the levy of voter-approved taxes . . . . (Tr. 1719, 1734). (Finding IV (2)). (Our emphasis).

The system does not equalize the ability of school districts to increase school millage rates, however. Nor does it purport to equalize the income wealth of the residents of school districts. Indeed, the "reward for effort" element operates to enlarge the disparities in school operating revenues which exist among the districts based upon their different tax rates and differing taxing abilities. Because the formula establishes an arbitrary property wealth ceiling of $48,000 per pupil, which is lower than the tax duplicates of some of the districts, disparities in educational opportunity based upon property wealth, as well as disparities based upon tax rates, continue to exist among Ohio's school districts. (Tr. 4510-4512, 3186-3187). (Finding IV (3)).

(4.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The Equal Yield Formula Does Not Assure Each School District An Equal Number of Dollars For Each Mill Levied Up To Thirty Mills, Regardless Of The Property Wealth Of The District. Indeed, Millage Variations Explain Only 41% Of The Variations In Guaranteed Yield, Leaving 59% Of The Variations To Be Occasioned By Other Factors, Principally Property Values.

THIS COURT:

> The Equal Yield Formula assures that each school district will receive an equal number of dollars for each mill levied up to 30 mills, regardless of the property wealth of the district. 58 Ohio St. 2d at 382.

THE FINDINGS OF FACT:

In a district power equalizing (DPE) formula which operates properly and achieves equal yield for equal effort, variations in the guaranteed yield (basic aid plus local revenues) should result from, and correlate directly with, variations in millage. (Tr. 3205) (Finding VIII-II (B)(7).

But Ohio's DPE formula is not effective for even this purpose. Guaranteed yield is influenced by factors other than millage to such an extent that even at full funding the system is, to a great extent, haphazard. (Tr. 3206) (Finding VIII-II (B)(8)).

[E]ven at full funding, millage variations explain only 41% of the variations in guaranteed yield, leaving 59% of the variations to be occasioned by other factors. (Tr. 3204) (Finding VIII-II (B)(15)).

These other factors include mandates, save-harmless, local yield above the guaranteed level, actual v. equalized mills and most significantly, property values. (Tr. 3206). (Finding VIII-II (B)(16)).

(B.) The Court's Conclusion That The School Financing Plan Does Not Violate The Command Of The Ohio Constitution's Thorough And Efficient Clause Because No School District Receives So Little Local And State Revenue That The Students Are Effectively Being Deprived Of Educational Opportunity Is Demonstrably Contrary To The Comprehensive Findings Of The Trial Court Founded Upon The Massive Record In This Case.

It is clear from the majority's opinion that the Court's holding that Ohio's system for financing elementary and secondary education is not violative of the Ohio Constitution's thorough and efficient clause, as construed by this Court in *Miller* v. *Korns*, 107 Ohio St. 287 (1923), rests upon the majority's incorrect conclusion that the system does not place any school district in such financial destitution that the students therein are effectively deprived of educational opportunity, that the equal yield formula ensures each child an adequate education, and that even the school closings that occur under the Ohio system are educationally innocuous. Each of those conclusions is contrary to specific and comprehensive findings made by the Common Pleas Court. As we demonstrate herein, the trial court found that so many of the school districts in Ohio are underfunded that a majority of Ohio's school children are being denied educational opportunity, and that school closings have an irreparably harmful educational and psychological effect upon school children.[1]

---

[1] The plaintiffs' proof of widespread educational deprivation was so comprehensive that on three separate occasions defendants' counsel objected to the plaintiffs calling any further witnesses to testify to it on the ground that such evidence had become cumulative. (Tr. 693, 750, 959.) In order to show the depth and breadth of the educational damage which the present system has brought to schoolchildren throughout Ohio, the plaintiffs interrogated more than forty witnesses who testified to educational deprivation which exists in twenty-four specific districts in the state, and showed, moreover, that because of the uniformity of inadequate funding in the majority of Ohio's school districts, submarginal educational conditions are pervasive throughout the state.

It was massive proof which gave rise to the trial court's hundreds of separate findings of fact concerning the nature and extent of educational deprivation which exists throughout Ohio as a direct result of the present school financing system. We urge this Court to apply its own chosen test to the findings of the court below. In so doing, inasmuch as the Equal Yield Formula's guarantee at 20 mills *is not* sufficient to ensure that each child receives an adequate education, this Court must conclude that the system devised by the General Assembly is *unconstitutional.*

(1.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That Conditions Of Educational Deprivation Are Pervasive Throughout A Majority Of Ohio's School Districts And That The Present System Falls Far Short Of Delivering To The School Districts Sufficient Resources To Enable Them To Provide A Satisfactory Level Of Education To The Overwhelming Majority Of Ohio's Schoolchildren.

THIS COURT:

> This court, therefore, intimated in *Miller* v. *Korns, supra,* that the wide discretion granted to the General Assembly is not without limits. For example, in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity, such a system would clearly not be thorough and efficient. 58 Ohio St. 2d at 387, footnote omitted.
>
> * * *
>
> To the extent that the Equal Yield Formula's guarantee at 20 mills is sufficient to ensure that each child receives an adequate education, the system devised by the General Assembly is constitutional. . . . 58 Ohio St. 2d at 387-88.

THE FINDINGS OF FACT:

Financial resources are so limited in the closing audit districts that in none of those districts are the children receiving more than barely minimal educational opportunities. The superintendents of those districts described the educational programs they are able to provide as "just able to get by" and below state minimum standards (Tr. 678), "barely adequate" (Tr. 709), not having enough money "to carry on an educational program" (Tr. 783), lacking "severely in the quality level" (Tr. 820), not allowing each child to exploit his individual talents to the fullest (Tr. 900, 981), "the bare minimum . . . just enough to be chartered". (Tr. 983). (Finding VII (E)(1)).

In the case of each of the districts so disadvantaged, the conditions are the direct result of a severe shortage of funds. (Finding VII (E)(2)).

The physical plants in the audit districts are inadequate, obsolete, not well maintained and inefficient. (Finding VII (E)(3)).

The physical plants in a school district are substantially educationally significant. Obsolete, poorly lighted, inadequately maintained school buildings impair teaching and learning efficiency and have a negative effect upon student morale and motivation. (Tr. 488-489, 816-817, 1005-1007, 1122-1124). (Finding VII (E)(4)).

The audit districts have been forced to reduce their professional and non-professional staffs, have exceedingly high pupil-teacher ratios and class sizes, and are unable to pay salaries high enough to attract teachers having substantial training and experience. (Finding VII (E)(7)).

The ratio of teaching staff to students is educationally significant. It bears a direct relationship to the quality of the educational program. Low pupil-teacher ratios are especially important for primary grade students and for students who have learning disabilities and special educational needs.

(Tr. 1165-6, 4458, 4669, 4670, 1385, 1471, 2150, 848-849, 1032). The educators who testified in this case were virtually unanimous in their agreement with this proposition. (Finding VII (E)(8)).

In the audit districts the curricula are restricted and the course offerings are limited to the "basic" subjects. Most of those districts have had to curtail the breadth of their course offerings in recent years due to financial shortages. (Finding VII (E)(11)).

A full range of curricula is essential to affording to all students the opportunity to fulfill their educational potentials, especially children with learning disabilities and gifted children. (Tr. 4458, 1166, 1169). (Finding VII (E)(12)).

The audit districts uniformly suffer from a shortage of textbooks and the financial inability to purchase up-to-date textbooks. (Finding VII (E)(17)).

It is beyond dispute that having up-to-date textbooks for every student is essential to providing even a minimal educational opportunity to children. (Tr. 1167) (Finding VII (E)(18)).

The children in the audit districts are similarly deprived of library books, educational equipment and educational supplies. (Finding VII (E)(20)).

The plaintiffs showed with documentary and statistical evidence and with expert testimony that in all likelihood the conditions of educational deprivation which exist in the audit districts also exist in all of the districts in the state which fall in the same range of dollars per pupil as do the audit districts. The number of districts which are similarly limited financially is 377. They comprise over 60% of the districts in the state. Eight hundred ninety-five thousand students are enrolled in those districts. (Tr. 3146) (Finding VII (F)(1)).

From the above evidence, the Court concludes that conditions of widespread educational deprivation which the testimony of the superintendents showed to exist in the closing

audit districts, exist throughout more than half of the school districts in this state. (Finding VII (F)(3)).

The same conditions of educational deprivation existing in the audit districts, which, with the exception of Toledo, are essentially rural, also exist in the principal urban, inner-city districts. The plaintiffs introduced substantial evidence of educational conditions in the Toledo, Cleveland and Columbus school districts, and presented comprehensive evidence of educational conditions in the Cincinnati City district, one of the representative plaintiffs. Based upon the testimony of Superintendent Briggs of the Cleveland district, Superintendent Dick of the Toledo district and Superintendent Ellis of the Columbus district concerning conditions in those districts, the conditions which the evidence shows to exist in the Cincinnati district are so essentially similar to those which exist in the other three urban districts that the Court regards them to be deserving of separate findings. (Finding VII (G)(1)).

As a result of these staff and curriculum limitations, the educational opportunities in the Cincinnati School district have declined quantitatively and qualitatively. (Tr. 1611, 2161). As a result the school children are generally grossly deficient in basic skills. (Tr. 1560). (Finding VII (G)(2.64)).

No secondary school in the district is totally in compliance with state minimum standards. (Tr. 2182). (Finding VII (G)(2.68)).

[T]he Court finds that the Cincinnati City School district is financially destitute, is starved for funds, lacks teachers, adequate buildings and equipment, and that the school children resident in that district are receiving submarginal educational opportunities. (Finding VII (G)(3)).

The Court finds that the Cleveland City School District is so starved for funds that public education in Cleveland is in a condition of virtual chaos. (Finding VII (G)(17)).

Thus, the Court finds that the Columbus City School district is so financially destitute, as are the Cincinnati, Toledo and Cleveland districts, and further finds that the quality of

public education in the large urban districts of this state is submarginal. None of these districts can survive under the present system. (Finding VII (G)(25)).

The Court finds from the overwhelming and uncontroverted evidence presented, including the descriptive testimony and unanimous opinions of the school superintendents and other experts on urban education, that the large urban, inner-city districts have unique and special problems and substantial extra costs which the non-urban districts do not have. . . . (Finding VII (G)(26)).

The problems of the urban school districts are related to the problems of the cities themselves. Urban problems such as poverty, unemployment and crime adversely affect the school children in inner-city districts. (Tr. 3887). The children from improverished homes where educational and cultural levels are exceedingly low begin school with educational deficits. School districts which have to overcome those deficits require extra personnel in order to diagnose the the deficits and then correct them. Indeed, the districts which have the largest concentration of students with educational and psychological problems should have the lowest ratios of professional staff to pupils. (Tr. 1471). The evidence indicates, however, that those urban districts have pupil-teacher ratios which are among the highest in the state. (Tr. 2594-9). The evidence also shows that the urban districts are among the lowest ranking districts in the state in expenditures for instruction. (Tr. 2954-9). This is the direct result of the fact that the urban districts lack the total financial resources necessary to deliver the educational resources which the children in those districts require. (See Findings VI(E)(2, 78), VI (E)(9), VI (E)(11) and VI(E)(18)). (Finding VI (G)(27)).

The Court also finds that the present system for financing public education in Ohio fails to compensate the urban districts for their substantial extra costs and fails to equip them to deal adequately with their special problems. Specifically,

the categorical grants including the grant called Disadvantaged Pupil Impact Aid fall woefully short of compensating the urban districts for their special costs. (Plaintiffs' Exh. 48, 30, Tr. 1418, 1495-1502, 1785-87, 2167-8). (Finding VII (G) (28)).

The Court further finds that as a result of that failure many of the children who attend school in the urban districts are substantially disadvantaged educationally. (Finding VII (G) (29)).

The school children who are enrolled in those districts which had total state and local support of less than $1000 per pupil in 1975-76, received substandard educational services that year (Finding VII (G)(2.6)) and may be presumed to be receiving substandard educational services at the present time since school district costs are escalating at a greater rate than are school district revenues. (Finding VI(C)(7)). Sixty-two percent of Ohio's students were enrolled in districts which had less than $1100 per pupil in total state and local support in 1975-76 (Finding VI(A)(14)) and they may similarly be presumed to be currently receiving educational services of the same level they received in 1975-76.

[T]he Court concludes that a substantial majority of Ohio's pupils (the 62% enrolled in the districts which had less than $1100 total support per pupil in 1975-76) are presently receiving less than adequate educational services and opportunities. (Finding VII (I)(1.1)).

[I]t is clear that the school districts in this state generally fall far short of having sufficient resources to provide a satisfactory level of education to the overwhelming majority of Ohio's school children, and the Court so finds. Moreover, the present finance system falls far short of funding a system of public schools which can comply with the State Board of Education's minimum standards. That fact alone supports the finding that, by and large, the school children in Ohio are getting educationally shortchanged. (Finding VII (1) (1)(1.5)). (Our emphasis).

(2.) Contrary To This Court's Conclusory Statement Of Fact, The Common Pleas Court Found That The School Closings That Occur Under The Present System Bring Irreparable Educational Harm To The Affected Students.

THIS COURT:

> [P]laintiffs attempt to equate school closings with "educational deprivation," . . . . 58 Ohio St. 2d at 288.

THE FINDINGS OF FACT:

All of the children deprived of schooling as a result of school closings suffered educational losses. The educational development of the children was affected because a loss of a day of instruction can never be recaptured. (Tr. 540, 7412). The learning process of the children in kindergarten and in the early primary grades is disrupted more by closings than is that of the older children because the beginners forget at a faster rate than the more advanced students and, thus, have more to re-learn when they return. (Tr. 675, 704, 614, 688). (Finding VII (D)(1)).

Although the lost days are made up during the second half of the school year, the loss in sequential learning cannot be made up. (Tr. 540). High school seniors are affected adversely by prolonged school years because their time to earn money for college or to hunt for jobs is curtailed. (Tr. 703-4). (Finding VII (D)(2)).

School closings and levy defeats also damage student morale and teacher morale. This damage has a detrimental effect upon the educational process. Students are also hurt phychologically by school closings. (Tr. 614-5, 675-6, 688, 739-40, 811). (Finding VII (D)(3)).

III. This Court Has Violated Its Own Customary Procedural Rule And In So Doing Has Deprived The Plaintiffs Of Due Process Of Law And Equal Protection Of The Laws Guaranteed By The Fourteenth Amendment To The United States Constitution.

The nearly 400 page findings of fact of the trial court were adopted in their entirety by the Court of Appeals. For decades litigants in Ohio have been bound by "the established practice of the Supreme Court to refuse to weigh the evidence to determine . . . whether correct conclusions as to the facts were reached by the court below."[2] Indeed, this Court has stated that "no court of review is permitted upon appeal . . . to substitute its judgment as to conclusions of fact for that of the trier of the facts".[3]

The decision of this Court is based on numerous factual assertions which are in direct conflict with the trial court's affirmed findings of fact. Those findings, which were based upon the trial judge's passing upon the credibility of the numerous witnesses and upon his weighing of the evidence, are fully supported by the record in this case. Defendants-appellants have never disputed this fact.

This Court's violation of its long-standing rule of practice by ignoring the affirmed findings of fact and devising contrary findings has deprived the plaintiffs of federal constitutional rights guaranteed by the due process of law clause, the equal protection of laws clause and the privileges and immunities clauses of the Fourteenth Amendment. The deprivation of federal constitutional rights suffered by plaintiffs as a result of

---

[2] *State ex rel. Pomeroy* v. *Webber*, 2 Ohio St. 2d 84, 85 (1965). *Accord*, 5 Ohio Jurisprudence 3d 167 § 593 (1978):

> . . . it is and has been for many decades the established practice of the Supreme court to refuse to weigh the evidence to determine . . . whether correct conclusions as to the facts were reached by the court below. (footnote omitted).

[3] *Gates* v. *Board of Education*, 11 Ohio St. 2d 83, 86 n.4 (1967).

this Court's arbitrary decision not to follow its own stated rule of practice impels the Court to set this matter for rehearing.[4]

(A.) The Court's Decision Violates The Federal Due Process Rights Of The Plaintiffs

It is axiomatic that this Court is constitutionally required to provide due process of law in accordance with the mandates of the Fourteenth Amendment.[5] Due process of law is an evolving concept, the importance of which to our society has been described by the United States Supreme Court as follows:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.
> *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971).

Due process of law has been variously defined to mean "fair

---

[4] This Court must always keep before it that the provisions of the Federal Constitution are the supreme law of the land, *Zanesville* v. *Wilson*, 51 Ohio App. 433 (Ct. App. Muskingum Co.), *aff'd*, 130 Ohio St. 286 (1935) and that no right granted or secured by the United States Constitution can be impaired in any manner by a law or pronouncement of a state governmental agency. *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902). Any state practice, no matter how clearly within a state's acknowledged power, which interferes with or is contrary to the United States Constitution, must yield. *Free* v. *Bland*, 369 U.S. 663, 666 (1962); Article VI, Clause 2, United States Constitution.

[5] It is the sworn duty of this Court to uphold the United States Constitution. Ohio Constitution, Article XV, Section 7; Ohio Revised Code § 3.23.

procedure,"[6] "fair, right and just" procedures,[7] and "fundamental fairness in the light of the total circumstances."[8]

Citizens are entitled to due and regular process not only in the pleading, hearing and consideration of their litigated claim, but also in the *disposition* of their litigated claim.[9]

Generally, due process does not require that a state provide for appellate review of civil cases. However, where the state does provide a means of appeal, the appeal process which is created "must be exercised without discrimination."[10] Such discrimination occurs in violation of the Fourteenth Amendment when a case between litigants is arbitrarily decided by a court "in violation of settled principles of law and contrary to undisputed facts."[11]

Furthermore, the United States Supreme Court has stated that in the review of a criminal case on appeal:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
> *Cole* v. *Arkansas*, 333 U.S. 196, 202 (1948).

---

[6] *Poe* v. *Charlotte Memorial Hospital, Inc.*, 374 F. Supp. 1302, 1311 (W.D. N.C. 1974) (3 Judge Court).

[7] "Due process is that which comports with the deepest notions of what is fair and right and just." *Solesbee* v. *Balkom*, 339 U.S. 9, 16 (1950) (Frankfurter, J. dissenting).

[8] *Whitfield* v. *Simpson*, 312 F. Supp. 889, 874 (E.D. Ill. 1970) (3 Judge Court); *Buttny* v. *Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968).

[9] *Martin* v. *Neuschel*, 396 F.2d 759, 760 (3rd Cir. 1968).

[10] *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 43 (1954). *Accord*, *Oppenheimer* v. *Roth*, 468 F.2d 901, 902 (9th Cir. 1972); *In re Brown*, 439 F.2d 47, 51 (3rd Cir. 1971) (en banc); *Compton* v. *Naylor*, 392 F. Supp. 575, 578 (N.D. Tex. 1975) (3 Judge Court).

[11] *Williams* v. *Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940), *citing*, *Postal Telegraph Cable Co.* v. *Newport, Ky.*, 247 U.S. 464 (1918).

The plaintiffs submit that this Court's action in arbitrarily choosing not to follow its long-standing practice not to substitute its judgment as to findings of fact for that of the trier of facts is an unpredictable, unfair, non-rational and discriminatory disposition of their claims in violation of the due process clause of the Fourteenth Amendment.

(B.) The Effect Of This Court's Decision Is That Of Denying The Plaintiffs Access To The Courts

The right to meaningful access to the courts of a state is a fundamental right protected by the due process[12] and privileges and immunities[13] clauses of the Fourteenth Amendment and by the redress of grievances[14] provision of the First Amendment. The right to meaningful access to the courts has always meant that all litigants will have like access and equal treatment by the courts. As early as 1885, the United States Supreme Court stated that all persons

> . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . .
> *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885).[15]

---

[12] *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974); *Procunier* v. *Martinez*, 416 U.S. 396, 419 (1974); *Moeck* v. *Zajackowski*, 541 F.2d 177, 180 (7th Cir. 1976); *Silver* v. *Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Hall* v. *Maryland*, 433 F. Supp. 756 (D. Md. 1976); *Hooks* v. *Wainwright*, 352 F. Supp. 163, 167 (M.D. Fla. 1972).

[13] *Angel* v. *Bullington*, 330 U.S. 183, 188 (1947); *Broderick* v. *Rosner*, 294 U.S. 629, 642 (1935); *Canadian Northern R. Co.* v. *Eggen*, 252 U.S. 553, 560 (1920); *Slaughter-House Cases*, 83 U.S. 394, 409 (1872); *Crandall* v. *Nevada*, 73 U.S. 744, 747 (1867). *See also*, *Corfield* v. *Coryell*, 6 Fed Cases 3230 (1823).

[14] *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585 (1971); *Dreyer* v. *Jalet*, 349 F. Supp. 452, 484 (S.D. Tex. 1972), *aff'd*, 479 F.2d 1044 (5th Cir. 1973).

Plaintiffs-appellees and cross appellants submit that their right to like and meaningful access to the courts and equal treatment by those courts is denied when this Court arbitrarily imposes a different rule of practice upon them than upon all other litigants.

(C.) This Court Has Denied The Plaintiffs The Equal Protection Of The Laws

The equal protection clause of the Fourteenth Amendment prohibits a State from drawing a legal line which constitutes an invidious discrimination against a particular class of citizens.[16]

In determining whether a state-established classification violates the equal protection clause, the Court must decide whether duties or burdens different from those resting upon the general public are cast upon the class.[17] The equal protection guarantee means that the rights of all citizens must

---

[15] *See also*, *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States but is granted and protected by the Federal Constitution.

[16] *Stanley* v. *Illinois*, 405 U.S. 645, 652 (1972); *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968).

[17] *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U.S. 96, 104-05 (1899).

rest upon the same rule under similar circumstances, and applies to the exercise of all the powers of a state which can affect the individual or his property.[18] In short, all persons similarly circumstanced must be treated alike.[19]

While this Court has now decided that children do not have a fundamental right to an education in this State, nonetheless, those children do have a legitimate entitlement to a public education as a property interest which is protected by the Fourteenth Amendment.[20] In addition, as pointed out in the previous section, those children have a fundamental constitutional right to like and meaningful access to the courts and equal treatment by the courts.[21]

This Court's decision creates two classes of litigants. Heretofore, all litigants in this State were treated alike in that unless no evidence existed to support a trial court's finding, the reviewing court could not substitute its judgment as to a finding of fact for that of the trier of facts.[22] This Court's failure to apply that same rule to the present litigants is an act of

---

[18] *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 37 (1928); *Maxwell* v. *Bugbee*, 250 U.S. 525, 541 (1919); *Southern R. Co.* v. *Greene*, 216 U.S. 400, 412 (1910); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 238 (1889).

[19] *Johnson* v. *Robison*, 415 U.S. 361, 374-75 (1974).

[20] *Goss* v. *Lopez*, 419 U.S. 565, 573-74 (1975).

[21] The equal protection clause, while not affording a litigant a right of appeal, does guarantee that if an appellate process is provided all litigants are to be treated alike. *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972); *Javits* v. *Stevens*, 382 F. Supp. 131, 140 (S.D. N.Y. 1974). Indeed, the United States Supreme Court has ruled that state courts that apply a rule of procedure in a discriminatory manner run afoul of the Fourteenth Amendment. *Douglas* v. *California*, 372 U.S. 353 (1963).

[22] *G.S.T.* v. *Avon Lake*, 48 Ohio St. 2d 63 (1976); *In re Estate of Duiguid*, 24 Ohio St. 2d 137 (1970); *Gates* v. *Board of Educ.*, 11 Ohio St. 2d 83 (1967); *Gillen-Crow Pharmacies, Inc.* v. *Mandzak*, 5 Ohio St. 2d 201 (1966); *State ex rel. Pomeroy* v. *Webber*, 2 Ohio St. 2d 84 (1965); *Jaffrin* v. *DiEgidio*, 152 Ohio St. 359 (1949); *Union Properties, Inc.* v. *Cleveland Trust Co.*, 152 Ohio St. 430 (1949); *McKellips* v. *Industrial Comm. of Ohio*, 145 Ohio St. 79 (1945); *In re Estate of Lowry*, 140 Ohio St. 223 (1942); *State ex rel. Kobelt* v. *Baker*, 137 Ohio St. 337 (1940); *Peer* v. *Industrial Comm. of Ohio*, 134 Ohio St. 61 (1938); *State ex rel. Puehler* v. *Board of Educ.*, 134 Ohio St. 280 (1938); *Maus* v. *Auglaize Bank*, 125 Ohio St. 32 (1932); *F.W. Woolworth Co.* v. *Kinney*, 121 Ohio St. 462 (1929); *Hamilton* v. *Dilley*, 120 Ohio St. 127 (1929); *Katz* v. *American Finance Co.*, 112 Ohio St. 24 (1925); *McNab* v. *Board of Park Comm.*, 108 Ohio St. 497 (1923); *Sutter* v. *State ex rel. Maul*, 108 Ohio St. 309 (1923); *Ohio Collieries Co.* v. *Cocke*, 107 Ohio St. 238 (1923); *Taylor* v. *Flower Deaconess Home and Hospital*, 104 Ohio St. 61 (1922); *Foster* v. *Scottish Union & Natl. Ins. Co.*, 101 Ohio St. 180 (1920).

invidious discrimination against those litigants which violates their constitutional right to equal protection of the laws.

IV. Conclusion

In his famous dissenting opinion in *Northern Securities Company* v. *United States*, 193 U.S. 197, 400-2 (1903) (Holmes, J. dissenting), Justice Holmes laid down a principle of judicial behavior which should guide this Court to apply its customary procedure of adhering to the trial court's findings of fact, even in this case of overriding political consequence:

> Great cases, like hard cases, made bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of *some accident of overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law will bend.* (our emphasis)

In deciding such a case, as this one is, a court should proceed in the same manner as if it were deciding a routine case, in Holmes' words, "with the same natural and spontaneous interpretation that one would be sure of if the question arose upon an indictment for a similar act which excited no public attention, and was of importance only to the prisoner before the court."

Thus, in reviewing the judgments of the courts below, this

Court must apply its customary rule of accepting the supportable findings of the Common Pleas Court that "the school districts in this state generally fall short of having sufficient resources to provide a satisfactory level of education to the overwhelming majority of Ohio's school children" as it would a finding of a trial court in an automobile accident case that a defendant was driving his vehicle 90 miles an hour through a crowded intersection.

In upholding the Ohio system for financing elementary and secondary education, this Court's majority not only cast aside evolving, enlightened principles of constitutional law and consigned the rights of Ohio's schoolchildren to a constitutional limbo, it violated its own time-honored practice of adhering to the affirmed findings of fact of the Court of Common Pleas. That is the import of dissenting Justice Locher's statement that, "the majority opinion flies square in the face of reality, not to mention the findings of fact and conclusions of law of the trial court and the Court of Appeals." 58 Ohio St. 2d at 391.

As demonstrated above, in deciding this case in that manner, this Court violated the federal constitutional rights of the plaintiffs.

The Court cannot rectify that constitutional violation by any means less drastic than granting this motion for rehearing and scheduling this case for reargument.

Respectfully submitted,

OF COUNSEL:

James B. Helmer, Jr.
Barbara Bison Ford
Kevin E. Irwin

/s/ JOHN A. LLOYD, Jr.
NANCY A. LAWSON
610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202
513/381-7200

Attorneys for Appellees and
Cross-Appellants

[CERTIFICATE OF SERVICE OMITTED]

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus)

1979 TERM
To wit: July 18, 1979

No. 78-1284

Board of Education of the City School District of the City of Cincinnati, et al.,
Appellees and Cross-Appellants,

vs.

Franklin B. Walter, et al.,
Appellants and Cross-Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of July, 1979.

THOMAS L. STARTZMAN, Clerk.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI ET AL., APPELLEES AND CROSS-APPELLANTS, v. WALTER ET AL., APPELLANTS AND CROSS-APPELLEES.

[Cite as Bd. of Edn. v. Walter (1979), 58 Ohio St. 2d 368.]

Schools—Financing—Constitutionality of statutory system.

The statutory system established by the General Assembly for the financing of public elementary and secondary education (R. C. 3317.022; R. C. 3317.023[A], [B] and [C]; R. C. 3317.02[E]; R.C. 3317.53[A]; and Section 30 of Am. Sub. S. B. 221 effective November 23, 1977) does not violate either Section 2 of Article I, or Section 2 of Article VI of the Ohio Constitution.

(No. 78-1284—Decided June 13, 1979.)

APPEALS from the Court of Appeals for Hamilton County.

This cause was filed in the Court of Common Pleas of Hamilton County as a declaratory judgment action on April 5, 1976, seeking to have the Ohio system of financing public elementary and secondary education declared unconstitutional under the Ohio Constitution. The trial court decided that the cause was a proper class action, and the following constitute the parties plaintiff:

(A) The Board of Education of the City School District of the City of Cincinnati;

(B) Members of that board;

(C) The Superintendent of Schools for the City School District of the City of Cincinnati;

(D) The Clerk-Treasurer of the City School District of the City of Cincinnati;

(E) The named students who reside in the City School

District of the City of Cincinnati and who attend the Cincinnati public schools;

(F) The named parents of children attending such schools who also are owners of real property located in the Cincinnati School District;

(G) All of the above in their representative capacities and as representative parties on behalf of all similarly situated school districts in Ohio, the members of the boards of education for such school districts, all administrators employed by such school districts, the students who reside therein and attend public elementary and secondary schools operated by such school districts, the parents of such students, and the owners of real property situated in such school districts.

The trial was commenced on December 6, 1976, and consisted of 78 days of testimony, including the testimony of approximately 77 witnesses and the introduction of approximately 2,400 exhibits. The record consists of 7,530 pages of transcript.

The trial court held for the plaintiffs and declared certain statutory provisions in Ohio's school finance system void and inoperative under both Section 2 of Article VI, the Thorough and Efficient Clause, and Section 2 of Article I, the Equal Protection and Benefit Clause of the Ohio Constitution. In so doing, the trial court adopted and filed approximately 400 pages of findings of fact and 35 conclusions of law submitted by plaintiffs.

The defendants appealed to the Court of Appeals for Hamilton County. On Setember 5, 1978, the court issued its judgment affirming in part, and reversing in part, the trial court's decision. The Court of Appeals affirmed the trial court's holding that the statutory plan for financing elementary and secondary education violates the Equal Protection Clause of the Ohio Constitution but reversed the trial court's holding that the system violates the Thorough and Efficient Clause of the Ohio Constitution.

The defendants appeal from that part of the Court of

Appeals' judgment which held that the present system violates Ohio's Equal Protection Clause, while the plaintiffs cross-appeal from that part of the judgment which held that the system does not violate the Thorough and Efficient Clause.

The cause is now before this court pursuant to the allowance of a motion and cross-motion to certify the record.

Mr. John A. Lloyd, Jr., and *Ms. Nancy A. Lawson*, for appellees and cross-appellants.

Mr. William J. Brown, attorney general, *Mr. David H. Beaver* and *Mr. Henry A. Arnett*, for appellants and cross-appellees.

WILLIAM B. BROWN, J.

I.

The various provisions of Ohio law which are challenged in this litigation revolve around the allocation formula contained in R. C. 3317.022. That section provides the principal rule for state basic aid allocation, while the other challenged provisions adjust for cost differences among districts and facilitate the transition from the former formula to the guaranteed yield formula.

R. C. 3317.022 contains a two-part formula under which each school district participating in the state basic aid program is guaranteed:

"[T]he same number of dollars per pupil, *in state and local funds combined,* for each mill of local property tax effort as in any other district, up to a maximum millage rate set by the state [30 mills]." (Education Review Committee Report, December 15, 1974, at page 3; see fn. 1, *infra.*)

This "equal yield for equal effort" formula is calculated for each district by a formula which pegs the level of each district's state funding to a mathematically "equalized" level of property wealth and a mathematically "equalized" tax rate. The law requires that each school district levy at least 20

mills in order to participate, and it rewards districts which levy more than 20 school operating mills commensurately with their millage up to 30 mills. This last element is called "reward for effort." The entire basic support formula is referred to as "guaranteed yield" and "equal yield" and is a variation of a type of school financing called "district power equalizing," "power equalizing," "DPE," and "percentage equalizing." Its objective is to equalize the property wealth base upon which the school districts raise operating revenue through the levy of voter-approved taxes so that school districts receive the same number of dollars per pupil in basic state aid plus local revenue for each mill up to 30 mills.

The first step in the State Basic Aid Formula provides for a total yield of $48 per pupil per mill from both local revenue and state support for the first 20 mills, assuming the system is fully funded. This means that, if all the districts received all the local tax revenues which they were presumed under the formula to receive, each district in the state which levies 20 mills would be eligible to receive from local and state funds 20 mills x $48 or $960 per pupil. The state in that manner provides the basic support to each school district for the first 20 mills by making up the difference between the district local yield per pupil per mill and $48.

The second calculation for state basic aid is the element of the state finance system called "reward for effort," wherein the state pays a bonus to and rewards school districts for their school operating millage above 20 mills up to 30 mills. For that quantum of funding, the guaranteed level is pegged at $42 per pupil per mill. Since the purpose of the act is to pay extra monies to districts based upon the number of mills they levy beyond 20 mills, the procedure is to deduct the district's local yield per pupil per mill from $42 and multiply that difference by the number of students (Average Daily Membership [ADM]) and finally by the "equalized" millage in excess of 20 up to 30.

The enactment by the General Assembly of a guaranteed yield formula inherently involves a policy decision as to the

funding level or the amount to be guaranteed through the formula. The General Assembly's decision was to establish a funding level of $960 per pupil at 20 mills up to $1,380 per pupil at 30 mills.

That policy decision was based upon the recommendation of the Education Review Committee.[1] The committee in the "Goettle Report" found that the 1973-1974 cost for a school district to operate at the state minimum standards which define a general education of high quality was $715 per pupil. The committee, therefore, reasoned that the $960 guarantee at 20 mills was sufficient to provide an adequate program in each district. The committee also recognized that the funding level would necessarily have to be increased as inflation continued to increase the cost of education.

In addition to state basic aid, certain school districts also receive additional state aid under the "save harmless" guarantee. This provision guarantees that a school district will not receive less under the new "Equal Yield Formula" than it did under the former funding system. The state also provides direct grants to school districts which offer specialized programs. Finally, the system rewards or penalizes school districts depending upon their compliance or non-compliance with certain mandated requirements.

II.

The first issue presented to this court for decision is whether Ohio's statutory system for financing elementary and secondary education violates the Equal Protection and Benefit Clause, Section 2, Article I of the Ohio Constitution.

---

[1] The Education Review Committee was established in 1973 and continues to function. It is a joint, nonpartisan legislative committee created by the General Assembly to analyze Ohio's school finance system and to consider alternative distribution methods for allocating state basic aid. It has been funded so as to have carried out those legislative directions and so as to have developed independent research capabilities to enable ongoing study and monitoring of the new formula.

The trial court's declaratory judgment order stated that the system establishes invidious classifications among Ohio's school children which are neither supported by any compelling state interest nor predicated upon any rational basis, resulting in a violation of the Equal Protection Clause. The Court of Appeals affirmed the trial court's findings and agreed that Section 2 of Article I of the Ohio Constitution provides Ohio's school-age children with a "fundamental right" to equal educational opportunity.

Defendants argue that the lower courts should be reversed on this issue because: (1) Ohio's system is rationally designed to allow local control in making decisions about services to be provided to meet perceived educational needs; (2) education is not a fundamental interest and, therefore, the financing system should not be subjected to "strict scrutiny"; and (3) even if the system is subjected to "strict scrutiny," local control is a compelling state interest justifying disparity of educational opportunity.

THE TWO-TIERED TEST FOR APPLYING THE EQUAL PROTECTION STANDARD

The courts below applied the "two-tiered test," formulated by the United States Supreme Court to Ohio's Equal Protection Clause. Defendants allege no impropriety with the application of that test and, indeed, this court has consistently applied federal guidelines in construing the Ohio Constitution's Equal Protection and Benefit Clause. *Porter* v. *Oberlin* (1965), 1 Ohio St. 2d 143; *State, ex rel. Struble* v. *Davis* (1937), 132 Ohio St. 555.

Simply stated, the test is that unequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality, unless the discrimination impairs the exercise of a fundamental right or establishes a suspect classification. See, *e. g.*, *McGowan* v. *Maryland* (1961), 366 U.S. 420, for the traditional scrutiny test; see, *e. g.*, *Shapiro* v. *Thompson* (1969), 394 U. S. 618; *Harper* v.

Virginia Bd. of Elections (1966), 383 U. S. 663; *Griswold* v. *Connecticut* (1965), 381 U. S. 479, for a discussion of "fundamental interest"; and see, *e. g., Graham* v. *Richardson* (1971), 403 U. S. 365; *Loving* v. *Virginia* (1967), 388 U. S. 1; *Oyama* v. *California* (1948), 322 U. S. 633. If the discrimination infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional. See, *e. g., Eisenstadt* v. *Baird* (1972), 405 U.S. 438, 447, footnote 7; *Dunn* v. *Blumstein* (1972), 405 U. S. 330, 342; *Memphis Am. Fed. of Teachers, Local 2032* v. *Bd. of Edn.* (C. A. 6, 1976), 534 F. 2d 699; *Tanner* v. *Weinberger* (C. A. 6, 1975), 525 F. 2d 51, 54. The preeminent consideration is that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement* v. *Murgia* (1976), 427 U. S. 307, 312. See, also, *Carey* v. *Population Services Intl.* (1977), 431 U.S. 678; *Maher* v. *Roe* (1977), 432 U. S. 464; *Zablocki* v. *Redhail* (1978), 434 U. S. 374. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.*, at page 388.

(1) *STRICT SCRUTINY*

The first step in applying the "strict scrutiny test" is to determine if a "fundamental interest" is affected. The United States Supreme Court in *San Antonio Indep. School Dist.* v. *Rodriguez* (1973), 411 U. S. 1, 33, stated that:

"[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education • • • Rather, the answer lies in

assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."

Indeed, if this court were to accept this test, educational opportunity would be a fundamental interest entitled to strict scrutiny. However, we reject the "*Rodriguez* test" for determining which rights are fundamental. While the test may have some applicability in determining which rights are fundamental under the Constitution of the United States, it is not helpful in determining whether a right is fundamental under the Ohio Constitution. The Constitution of the United States is one of delegated powers and all "powers not delegated to the United States, nor prohibited to the state, are reserved to the States respectively, or to the people."[2]

On the other hand, the Ohio Constitution is not one of limited powers, as it contains provisions which would be suitable for statutory enactment which are not considered fundamental to our concept of ordered liberty, *e. g.*, workers' compensation.[3]

Furthermore, the test set out in *Rodriguez, supra,* may not even be adequate for deciding what rights are fundamental under the United States Constitution. We note with approval the analysis of the test found in *Robinson* v. *Cahill* (1973), 62 N. J. 473, 303 A. 2d 273, where the Supreme Court of New Jersey, at page 491, stated:

"[W]e have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez,* that a right is 'fundamental' if it is explicitly or implicitly guar-

---

[2] Amendment X to the United States Constitution.

[3] Accord, *Olsen* v. *State, ex rel. Johnson* (1976), 276 Ore. 9, 554 P. 2d 139. The Oregon Supreme Court held that such a test was not helpful because, if it were to be applied literally, it would, for example, make the right to sell and serve liquor by the drink a fundamental interest entitled to "strict scrutiny" because it is contained in the Oregon State Constitution.

See, also, *Shofstall* v. *Hollins* (1973), 110 Ariz. 88, 515 P. 2d 590; *Thompson* v. *Engelking* (1975), 96 Idaho 793, 537 P. 2d 635.

anteed in the Constitution, is immediately vulnerable, *for the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment.* And if a right is somehow found to be 'fundamental,' there remains the question as to what State interest is 'compelling' and there, too, we find little, if any light." (Emphasis added.)

Finally, because this cause deals with difficult questions of local and statewide taxation, fiscal planning and education policy, we feel that this is an inappropriate cause in which to invoke "strict scrutiny." This case is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children.[4]

(2) *TRADITIONAL SCRUTINY*

Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or differences in state policy ° ° °" will be upheld. *Allied Stores of Ohio* v. *Bowers* (1959), 358 U. S. 522, 530.

This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown *beyond a reasonable doubt.* Paragraph one of the syllabus in *State, ex rel. Dickman,* v. *Defenbacher* (1955), 164 Ohio St. 142, states[5]:

---

[4] The granting of broad discretion as to classification by a legislature in the field of taxation has long been recognized. See *Madden* v. *Kentucky* (1940), 309 U. S. 83, 87-88; *Lehnhausen* v. *Lake Shore Auto Parts Co.* (1973), 410 U. S. 356; *Wisconsin* v. *J. C. Penney Co.* (1940), 311 U. S. 435, 445.

[5] This court has more recently repeated the strict evidentiary test which plaintiffs must meet in *State, ex rel. Lukens,* v. *Brown* (1973), 34 Ohio St. 2d 257; *e. g., State, ex rel. Jackman,* v. *Court of Common Pleas* (1967), 9 Ohio St. 2d 159; *In re Trust Estate of Ely* (1964), 176 Ohio St. 311.

"An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

It is against this standard that we must determine if a violation of the Equal Protection and Benefit Clause exists here.

Defendants admit that disparity exists in per pupil expenditures throughout Ohio's school districts. This disparity exists because of differences in property wealth and the willingness or unwillingness of voters in a particular school district to pass operating levies. However, defendants maintain that such disparate treatment has a rational basis and that plaintiffs have failed to prove beyond a reasonable doubt that disparate treatment is arbitrary and therefore unconstitutional. Defendants argue that Ohio's system is designed to allow local control in the making of decisions concerning the nature and extent of services to be provided to meet perceived educational needs. While assuring that all districts will have the fiscal resources to meet state minimum standards, defendants argue, that, by maintaining the ability of local school districts to tax themselves beyond the 20 mill minimum taxing level, the formula operates to retain local citizen control of education through the tax referendum. This local control, defendants maintain, allows the local citizenry to decide what type of education (beyond state required basics) is best suited for the children of their community.

We find local control to be a rational basis supporting Ohio's system of financing elementary and secondary education. By local control, we mean not only the freedom to devote more money to the education of one's children but also

control over and participation in the decision-making process as to how those local tax dollars are to be spent.

The history of public education in Ohio is essentially a history of local control over education and the use of property as the primary means to finance that education. The use of land to support schools in Ohio pre-dates its admission to the Union. The Ordinance of 1785 provided that lot No. 16 of each township in the Northwest Territory be reserved for the maintenance of public schools within said township.

Pursuant to the Ohio Constitution of 1802,[6] the General Assembly in 1821 enacted a bill enabling local schools and school districts to be organized (19 Ohio Laws 51); and in 1825, the tradition of utilizing real property taxation to support public schools began when the General Assembly passed a bill directing county commissioners to levy a real property tax of one-half of one mill to support local public schools (23 Ohio Laws 36).

During the remainder of the Nineteenth Century, local property taxes continued to be the sole means of support for local public schools. However, when shifts in population due to the growth of commercial and industrial centers began to create disparities in local resources, Ohio undertook a program in 1906 calling for a large measure of state financial participation. This program was commonly referred to as "state aid for weak school districts." (98 Ohio Laws 200.) The goal of this program was to provide some minimum support to the poorer school districts. Thus, early as 1906, the Ohio General Assembly established for school funding purposes a financial partnership between state government and local school districts.

The history of educational funding in Ohio, therefore, has

---

[6] The Ohio Constitution of 1802 stated, in pertinent part:
"• • • But religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." (Article VIII, Section 3, of the Ohio Constitution of 1802.)

been an accommodation between two competing interests—the interest in local control of educational programs and the means to fund them and the interest of the state in insuring that all children receive an adequate education. This phenomenon is not peculiar to Ohio. As stated by Professor Coleman:

"The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children." Coleman in Foreword to Strayer-Haig, The Financing of Education in the State of New York (1923), at vii.

Ohio has continued this financial partnership with local school districts until the present day. In 1935, the General Assembly enacted the first Foundation Program (116 Ohio Laws 585, 587), providing substantial financial aid to school districts. This program consisted of a flat distribution to each school district, based on average daily attendance, and "additional aid" for poorer school districts. The "additional aid" nelped equalize the funds available for each school student in all districts across Ohio.

During the 21 years the Foundation Program was in effect, it was amended numerous times, and each amendment had the effect of increasing the amount of state aid. The amount of minimum "local effort" required to be levied by local school districts in order to receive "additional aid" also was increased gradually from 3 mills to 10 mills by 1955. Despite the increase in the total amount of state aid, the percentage of state support of local school districts' total operating costs dropped considerably.

Effective in 1956, Am. S. B. No. 321 (126 Ohio Laws 288) was enacted, which changed the format of state aid from "average daily membership" to a "teacher-unit" plan of state support. That enactment increased state aid to local school districts once again.

By the 1965-1966 school year, the state was providing approximately one-third of the total operating costs, with the local property tax furnishing the remainder. The General Assembly enacted Am. Sub. H. B. No. 950 (131 Ohio Laws 2024), which resulted in increased state aid to local school districts. Further legislation in the late 1960's and early 1970's further increased state support.

In fiscal year 1975-1976, the General Assembly enacted the Equal Yield Formula contained in Am. Sub. S. B. No. 170 (see Part I, *supra*) (136 Ohio Laws 475) which provides an equal sum of money (local and state combined) on a per-pupil-per-mill basis, for each qualifying school district, *i. e.*, one that has levied 20 mills for current operating expenses. (Voted millage, millage inside the unvoted 10-mill limitation for operation and the voted millage for joint vocational school district operation are included in this requirement.) The Equal Yield Formula approach represents a continuation of the partnership between the state and the local school districts. Presently, however, state support is far greater than ever before.[7]

Therefore, Ohio has historically attempted to ameliorate disparity in the levels of expenditures without destroying the virtues of local control. The present relationship is a result of over 150 years of experience in which Ohio has continually attempted to satisfy these competing interests.

We conclude that local control provides a rational basis supporting the disparity in per pupil expenditures in Ohio's school districts. This conclusion is valid from an historical point of view, and is also supported by conventional wisdom

---

[7] State support was $558,958,899 in fiscal year 1971; $1,224,329,776 (including property tax relief) in fiscal year 1976; and $1,399,905,919 (including property tax relief) in fiscal year 1978. Committee Staff, Education Review Committee of the Ohio General Assembly, Selected Statistics on Trends and Sources of Financial Support for Elementary and Secondary Education in Ohio. (November 15, 1978.)

concerning educational policy.[8] In addition to allowing people within a school district to determine how much money they are willing to devote to education, local control allows for local participation in the decision-making process that determines how these local tax dollars will be spent. Each school district can develop programs to meet perceived local needs.

We agree with the observation of Chief Justice Burger, who stated, in a dissenting opinion, in *Wright* v. *Council of the City of Emporia* (1972), 407 U. S. 451, at 478:

"Local control is not only vital to continued public support of the schools, but it is of overriding importance from an education standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals * * *."

Additionally, local control also provides an opportunity for "experimentation, innovation, and a healthy competition for educational excellence."[9]

As did the plaintiffs in the *Rodriguez* case, *supra*, plaintiffs herein argue, that even if local control is a rational basis for disparity in funding, local control could be preserved under

---

[8] See, generally, *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U. S. 1, 49-50.

In *Dayton Board of Education* v. *Brinkman* (1977), 433 U. S. 406, the Supreme Court stated:

"[L]ocal autonomy of school districts is a vital national tradition." *Brinkman, supra*, at page 410.

In *Thompson* v. *Engelking, supra* (96 Idaho 793), at page 803, it was noted that:

" 'The American people made a wise choice * * * by retaining within the community, close to parental observation, the actual direction and control of the educational program.' * * *"

[9] 411 U. S., at page 50.

other financing schemes that would result in more equality in educational expenditures. As Justice Powell stated in *Rodriguez, supra,* at pages 50 and 51:

"While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandrige* v. *Williams,* 397 U.S., at 485. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion 'less drastic' disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. *Dunn* v. *Blumstein,* 405 U.S., at 343; *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960)."

Therefore, although the Ohio system of school financing is built upon the principle of local control, resulting in unequal expenditures between children who live in different school districts, we cannot say that such disparity is a product of a system that is so irrational as to be an unconstitutional violation of the Equal Protection and Benefit Clause. The Equal Yield Formula assures that each school district will receive an equal number of dollars for each mill levied up to 30 mills, regardless of the property wealth of the district. The number of dollars guaranteed per pupil at the 20 mill level has been determined by the Educational Review Committee to be sufficient to assure that all school districts are given the means to comply with the State Board of Education Minimum Standards, which describe a program of "high quality" pursuant to R. C. 3301.07(D).

III.

The plaintiffs, as cross-appellants, seek to reverse the decision of the Court of Appeals sustaining the defendants' third assignment of error before that court, which read:

"The trial court erred by determining that R. C. 3317.022, R. C. 3317.023(A), (B) and (C), R. C. 3317.53(A) and (B), R. C. 3317.02(E) and Section 30 of the amended substitute Senate Bill 221 violate the 'thorough and efficient system' clause of Article VI, Section 2 of the Ohio Constitution."

In sustaining that assignment of error, the Court of Appeals stated:

"The court [of common pleas] * * * overstepped its power in deciding that the finance system for public schools adopted by the General Assembly represents an 'abdication' by the Assembly of its duty under Article VI, Section 2 of the Ohio Constitution. Although exceptions have been judicially recognized, the general rule of noninterference enjoys widespread acceptance; that is, the courts have no power to enforce the mandates of the constitution which are directed at the legislative branch of the government or to control the work of the lawmakers."

Plaintiffs argue that, although Section 2 of Article VI of the Ohio Constitution which provides that "[t]he General Assembly shall make such provisions * * * as * * * will secure a thorough and efficient system of common schools throughout the state" invests the General Assembly with broad discretion in the matter of public education, the constitutional provision does not grant the General Assembly the exclusive authority to determine the criteria against which the exercise of that power is to be measured. They contend further that it does not disqualify the judiciary from adjudicating whether the General Assembly's attempt to formulate a plan for financing elementary and secondary education comports with the constitutional duty which devolves upon it.

The defendants, however, maintain that the issue presented here is a "political question" and, therefore, this court should

refrain from addressing it. To do so, they argue, would require this court to exercise powers constitutionally committed to a coordinate branch of government.

We wish to state clearly at the outset that this court has the authority, and indeed the duty, to review legislation to determine its constitutionality under the Constitution of Ohio and to declare statutes inoperative. The doctrine of judicial review articulated by Chief Justice John Marshall in the landmark case of *Marbury* v. *Madison* (1803), 5 U. S. (1 Cranch) 137, establishes the judicial branch as the final arbiter in interpreting the Constitution.

The doctrine of judicial review is so well established that it is beyond cavil. Consider this court's opinion in *State* v. *Masterson* (1962), 173 Ohio St. 402, which states, at page 405, in part:

"It has long been an established principle of law that courts do not interfere in political or legislative matters except in those instances where legislative enactments violate the basic law. In those instances where enactments violate the basic law, it was determined early in our judicial history that the courts have not only the power but the duty to declare such enactments invalid.

"One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law."

The defendants, however, while not directly attacking the doctrine of judicial review,[10] attempt to achieve a similar result by contending that the issue is a "political question." To support this contention defendants rely largely upon *Baker* v. *Carr* (1962), 369 U.S. 186. That portion of *Baker* quoted by the defendants would support their position. However, the language in *Baker* is not particularly persuasive.

---

[10] Defendants, however, filed a motion to dismiss in the trial court based on the grounds that the court lacked jurisdiction because of the separation of powers doctrine. The trial court overruled the motion, and the Court of Appeals sustained the lower court citing *Marbury* v. *Madison* (1803), 5 U. S. (1 Cranch) 137.

Baker supplies scant support for defendants' assertion that the actions of the Ohio General Assembly acting under the aegis of the Thorough and Efficient Clause are not judicially reviewable because such review would involve a "political question." *Baker* is not controlling for the following reasons:

(1) The Supreme Court found that there was no political question involved; and, therefore, the material relied upon by the defendants is *dicta*, not the law of the case.

(2) The high court's statements in *Baker* do not represent its most recent pronouncements on the "political question" doctrine. Whatever viability this doctrine had was certainly greatly dampened by the later decision in *Powell* v. *McCormack* (1969), 395 U. S. 486, in which the court reinstated Adam Clayton Powell to membership in the House of Representatives, delineated the power of the House to review its own membership, and put to shambles any attempts by legal scholars to reconcile the court's pronouncements in this area.

We find that the issue concerning legislation passed by the General Assembly pursuant to Section 2 of Article VI of the Ohio Constitution presents a justiciable controversy. In so finding, we find the decisions of the courts in New York, New Jersey and Washington helpful. In *Robinson* v. *Cahill* (1975), 69 N. J. 133, 351 A. 2d 713; *Board of Education, Levittown Union Free School District* v. *Nyquist* (1978), 94 Misc. 2d 466, 408 N. Y. Supp. 606; and *Seattle School District No. 1* v. *State* (1978), 90 Wash. 2d 476, 585 P. 2d 71, the courts had no difficulties concerning their authority to review the constitutionality of similar legislation.[11]

---

[11] As stated by the Supreme Court of Washington in the *Seattle* case (585 P. 2d 71), at page 83:

"The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary. * * * 'Both history and uncontradicted authority make clear that "'[I]t is emphatically the province and duty of the judicial department to say what the law is.'" *United States* v. *Nixon* * * * [418 U. S. 683, 703 (1974)], quoting *Marbury* v. *Madison*, 5 U. S. (1 Cranch), 137, 176 * * * (1803), even when that interpretation serves as a check on the activities of another

However, we agree with that portion of the Court of Appeals' opinion, which states: "Because this constitutional grant reenforces the ordinary discretion reposed in the General Assembly in its enactment of legislation, the judicial department of this state should exercise great circumspection before declaring public school legislation unconstitutional as a violation of Article VI, Section 2."

In recognition of the deference to be provided to the General Assembly in education matters, this court stated in *State, ex rel. Methodist Children's Home Assn.*, v. *Board of Education* (1922), 105 Ohio St. 438, 448:[12]

"° ° ° Pursuant to the authority so vested the legislative branch of the state has enacted the laws to which we have referred, and many others, with a view to making most adequate and satisfactory provision for the efficient education of the youth of the state. *With the wisdom or the policy of such legislation the court has no responsibility and no authority.* Its duty is limited to the interpretation of such provisions as are not clear, and the carrying into execution of laws enacted which are not in conflict with constitutional provisions." (Emphasis added.)

To state that the General Assembly must be granted wide discretion and that it is not the function of this court to question the wisdom of the statutes, is not to say that the General Assembly's discretion in this area is absolute. In

---

branch or is contrary to the view of the constitution taken by another branch.'" *Seattle School District No. 1* v. *Washington, supra,* at page 22.

[12] Accord, *Cronin* v. *Lindberg* (1977), 66 Ill. 2d 47, 360 N. E. 2d 360, in which the Supreme Court of Illinois was confronted with the issue of whether certain statutory sections dealing with the financing of public education were compatible with the Illinois Constitution. The court, at page 58, stated:

"° ° ° It is not the function of this court to question the wisdom of legislation which does not contravene constitutional safeguards. ° ° °

"° ° ° This court has consistently held that the question of the efficiency of the educational system is properly left to the wisdom of the legislature."

Miller v. *Korns* (1923), 107 Ohio St. 287, the court was confronted with a constitutional challenge to a statute authorizing funds raised by property taxation within one school district to be used to finance schools in other districts within the county. The court passed upon the constitutionality of the legislation, which was clearly related to the powers and duties of the General Assembly under Section 2, Article VI of the Ohio Constitution and upheld the statute as constitutional.

In *Miller* v. *Korns, supra,* at pages 297-298, the court made a statement concerning the "Thorough and Efficient Clause" which is highly pertinent to the case at bar:

"Section 2, Article VI of the Ohio Constitution, provides as follows:

" 'The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, *will secure a thorough and efficient system of common schools throughout the state.* ° ° °'

"This declaration is made by the people of the state. It calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide.

"With this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.

"A thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part of any number of the school districts of the state lacked teachers, buildings, or equipment.

"In the attainment of the purpose of establishing an efficient and thorough system of schools throughout the state it was easily conceivable that the greatest expense might arise in the poorest districts; that portions of great cities, teeming with

life, would be able to contribute relatively little in taxes for the support of schools, which are the main hope for enlightening these districts, while districts underpopulated with children might represent such taxation value that their school needs would be relatively over supplied."[13]

This court, therefore, intimated in *Miller* v. *Korns, supra,* that the wide discretion granted to the General Assembly is not without limits. For example, in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity,[14] such a system would clearly not be thorough and efficient.

We find, however, that the General Assembly has not so abused its broad discretion in enacting the present system of financing public education as to render the statutes in question unconstitutional. To the extent that the Equal Yield Formula's guarantee at 20 mills is sufficient to ensure that each child receives an adequate education, the system devised by the General Assembly is constitutional within Section 2, Article VI of the Ohio Constitution. The "Equal Yield Formula" attempts to establish a funding floor, at 20 mills, that is

---

[13] Paragraphs one and two of the syllabus in *Miller, supra,* provide:

"1. Sections 7575 and 7600, General Code (109 O. L., 148 and 149), providing for a tax levy of 2 65/100 mills, the proceeds of which are to be retained in the several counties of the state for support of the schools thereof, and for the apportionment thereof, are valid and constitutional, not repugnant to the federal and state Constitutions, nor to any limitation contained in either.

"2. Under Section 2, Article VI of the Ohio Constitution, making it mandatory upon the General Assembly to make such provisions by taxation or otherwise as will secure a thorough and efficient system of common schools throughout the state, appropriation by the Legislature of funds raised in one school district to the needs of other school districts is made in pursuance of a legitimate state and public purpose, and not in pursuance of a local or private purpose."

[14] See *San Antonio Indep. School Dist.* v. *Rodriguez, supra,* at page 25, where the United States Supreme Court stated that absent "absolute deprivation of education" the taxation system of financing public education was not unconstitutional.

sufficient to assure that each school district has the means to comply with state minimum standards. Although plaintiffs attempt to equate school closings with "educational deprivation," the uncontroverted fact is that school districts' calendar adjustments (school closings) have never resulted in any student receiving less than the full 182 days of instruction per year as required by R. C. 3313.48. Also, the record reveals that several urban school districts that claim to be "starved for funds" in fact offer programs and services in excess of state minimum standards.

The fact that a better financing system could be devised which would be more efficient or more thorough is not material.

IV.

STANDING

The defendants argue that the Cincinnati Board of Education, its members and administrative officials, lack standing to litigate this cause. This issue does not merit extended analysis. Defendants have not challenged the standing of the students who attend schools in the Cincinnati School District and similarly situated school districts in Ohio. Therefore, even if these statutory plaintiffs were found to lack standing, it is reasonable to assume that the constitutional questions raised in this action would nevertheless be pursued by the students and parents without the participation of the other plaintiffs. As the Court of Appeals stated of this issue: "The assignment seems [to be] 'much ado about nothing." Even the defendants in their brief admit that "[they] do not advance this assigned error as dispositive of the issue of this case." Also they concede that "the issue of standing is secondary to the paramount issue [in the case]."

The judgment of the Court of Appeals that the Ohio statutory system for financing elementary and secondary education violates Section 2, Article I of the Ohio Constitution is reversed. The judgment of the Court of Appeals that the Ohio statutory system for financing elementary and secondary edu-

cation does not violate Section 2, Article VI of the Ohio Constitution is affirmed.

For the reasons stated herein, the judgment of the Court of Appeals is reversed in part and affirmed in part.

Judgment reversed in part and affirmed in part.

CELEBREZZE, C. J., HERBERT, P. BROWN, SWEENEY and HOLMES, JJ., concur.

LOCHER, J., dissenting. I dissent from the judgment of the majority, holding that Ohio's statutory system for the financing of elementary and secondary education does not violate the Ohio Constitution. In my view, the present system violates both the Equal Protection and Benefit Clause of Section 2 of Article I, and the "Thorough and Efficient Clause," Section 2, Article VI of the Ohio Constitution.

I.

First, I respectfully disagree with the majority's conclusion to the effect that educational oportunity is not a fundamental right and, therefore, not entitled to strict judicial scrutiny under Equal Protection analyses. The Supreme Court stated, in *San Antonio School Dist.* v. *Rodriguez* (1973), 411 U.S. 1, 33, that:

"° ° ° [T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education ° ° °. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. ° ° °"

The right to an education is implicitly mandated by Sections 2 and 3 of Article VI of the Ohio Constitution, as follows:

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, *will secure a thorough and efficient system of common schools throughout the state;* but no religious or other sect, or sects, shall ever have any exclusive right to, or

control of, any part of the school funds of this state." (Emphasis added.) Section 2, Article VI.

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced ° ° ° within any city shall have the power ° ° ° to determine ° ° ° the number of members and the organization of the district board of education ° ° °." Section 3, Article VI.

Applying the "*Rodriguez* test," it follows that, in Ohio, educational opportunity is a fundamental interest entitled to strict scrutiny under Ohio's Equal Protection Clause. California, Connecticut, and Wisconsin have found educational opportunity to be a fundamental interest under the "*Rodriguez* test." *Serrano* v. *Priest* (1976), 18 Cal. 3d 728, 557 P. 2d 929; *Horton* v. *Meskill* (1977), 172 Conn. 615, 376 A. 2d 359; *Buse* v. *Smith* (1976), 74 Wis. 2d 550, 247 N. W. 2d 141.[15]

Over and above the *Rodriguez* test, I would find educational opportunity to be a fundamental right because of its nexus to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.

Finally, the provision of public education is the single most important function of our state. Education is at the very foundation of our democracy and "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an [adequate] education." *Brown* v. *Board*

---

[15] In *Robinson* v. *Cahill* (1973), 62 N. J. 473, 303 A. 2d 273, the New Jersey Supreme Court, although not applying the "*Rodriguez* test," went on to find their system of financing education in New Jersey unconstitutional because it violated the "Thorough and Efficient Clause," a provision identical to Ohio's "Thorough and Efficient Clause." On rehearing to determine a remedy, however, the court stated that the right of children to a thorough and efficient *education is a fundamental right* guaranteed by the state constitution and, therefore, must be administered equally. *Robinson* v. *Cahill* (1975), 69 N. J. 133, 351 A. 2d 713.

of Education (1954), 347 U.S. 483, 493. In this sense, the fundamental right to equal educational opportunity is the American Dream as incarnate as constitutional law.

The American Dream is thwarted by the archaic and unconstitutional statutory system of financing elementary and secondary education. Evidence abounds that Ohio's beleagured schools are overwhelmed by problems of such magnitude that the basic needs of pupils go unfulfilled. The majority opinion flies square in the face of reality, not to mention the findings of fact and legal conclusions of the trial court and the Court of Appeals.

In determining whether unequal educational opportunity exists among Ohio's school age children, this court is constrained by the nearly 400 page findings of fact of the trial court. These findings were adopted in their entirety by the Court of Appeals. This court has stated on many occasions that the court will not weigh the evidence to determine whether correct conclusions as to facts were reached by the court below. *State ex rel. Pomeroy* v. *Webber*, (1965), 2 Ohio St. 2d 84, 86, citing *State, ex rel. Kobelt*, v. *Baker* (1940), 137 Ohio St. 337, 340; accord, *G. S. T.* v. *Avon Lake* (1976), 48 Ohio St. 2d 63, 65, at fn. 2; *In re Estate of Duiguid* (1970), 24 Ohio St. 2d 137, 141. The only exception to this rule is where there is no evidence in the record of probative value to support them. *Gillen-Crow Pharmacies, Inc.*, v. *Mandzak* (1966), 5 Ohio St. 2d 201, 205; *Gates* v. *Board of Edn. of River Local School Dist.* (1967), 11 Ohio St. 2d 83. At no time has the appellant alleged that any of the approximately 400 page findings of the trial court are unsupported by the 7,500 page record.

There is a clear connection between the meager financial resources and the general malais of many schools, particularly those located in urban areas of the state.[16]

---

[16] "(G) Conditions in Urban Districts

"(1) The same conditions of educational deprivation existing in the audit districts, which, with the exception of Toledo, are essentially rural,

Problems associated with discipline; inadequate salaries; lack of textbooks; cramped facilities and outmoded equipment;[17] vandalism; low teacher morale; ebbing parental concern; demoralized non-teacher employees; payless pay days; absenteeism and truancy; consistent failures of school tax levies and bond issues;[18] record teacher resignations; desultory pupil achievement and many others are directly traceable to Ohio's inequitable system of funding. The voluminous trial record is replete with evidence substantiating the ills that threaten to engulf the schools and the linkage between those symptoms and the emaciated proceeds of Ohio's funding statutes.[19]

---

also exist in the principal urban, inner-city districts. * * *" Findings of Fact and Conclusons of Law, at page 93.

[17] "(E) Educational Conditions in Closing Audit Districts
"* * *

"(4) The physical plants in a school district are substantially educationally significant. Obsolete, poorly lighted, inadequately maintained school buildings impair teaching and learning efficiency and have a negative effect upon student morale and motivation." Findings of Fact and Conclusions of Law, at page 72.

[18] "(3) The evidence that the local property tax component of the system has utterly failed is overwhelming. Superintendent after superintendent of school districts which have been driven to closing or to the brink of closing schools for lack of funds testified to histories of consistent failures of school tax levies and school bond issues." Findings of Fact and Conclusions of Law, at page 186.

[19] "(9) Many of the districts have been forced to borrow from commercial banks and from bond retirement accounts, and have had to defer the payment of bills until the next school year.

"(10) The superintendents anticipate that the financial problems of their districts will become even worse in 1977 than they were in 1976, that the deficits will become larger and that their schools will have to be closed for longer periods in 1977 than they were in 1976.

"(11) School closings place districts in deeper financial holes because they incur additional costs for unemployment compensation, interest and make-up days.

"(12) The additional cost to the Toledo City District in unemployment compensation alone as a result of the 1976 closing was $1.5 million." Findings of Fact and Conclusions of Law, page 62.

The defendants, acknowledging that wide disparity in educational funding exists among Ohio's 617 school districts, argue that, even if this court finds educational opportunity to be a fundamental right, "local control" is a compelling state interest justifying the grossly unequal treatment of Ohio's school age children. Although local control may be a rational basis justifying the present system, it is clearly not compelling. Whatever may be said about "local control," the evidence shows that the present system has actually eroded such control; *i. e.*, poorly funded districts are not even able to offer adequate programs required by the state's own "minimum standards," let alone design programs to meet the individualized needs of the children within their district. Many experts testified that increased state funding would enhance local control.

Repeated allusions by the majority to the foresight of the legislators who framed our laws establishing local control of the public education process is scant solace to the pupil, teacher or administrator in the embattled schools. Indeed, many who feel that local control of the operations is necessary to accomplish a viable school system fear that the growing difficulties attacking the schools may bring about the demise of our educational system as we know it. Surely, desperate pleas for financial transfusion will go out to the federal bureaucratic establishment. When, and if, the calls for help are heeded, the strings that accompany the federal largesse will erode the cherished ideal of district control. Better the General Assembly shore up the disadvantaged school and, in the process, save the expressed community interests of our people.[20]

More importantly, Section 2, Article VI, places the primary responsibility for the education of our school age children *upon* the state of Ohio, *not* the local school district. Local control,

---

[20] "(3) The failure of the General Assembly to make provisions for the plants and facilities of the school districts represents an omission to provide for one of the essential elements of the public educational system." Findings of Fact and Conclusions of Law, at page 204.

therefore, cannot be utilized to justify the present system which creates: (1) vast disparities among Ohio's school districts in (a) total state and local support per pupil and (b) expenditures per pupil for instruction, and (2) the quantity and quality of educational services provided. The fact that many districts were forced to close their schools, for varying periods of time, in 1976, 1977 and 1978, and that many districts which avoided closing in 1978 were unable to deliver better than austerity levels of education, is a deplorable situation which cries out for a remedy. A loss of a day of instruction can never be recaptured.

II.

Second, while the General Assembly must be afforded broad discretion in establishing a "thorough and efficient system of common schools," in my view, it abuses that discretion where many school districts are so "starved for funds" that they are unable to comply with the state's own 'minimum standards," and are unable to remain open for the entire school year without interruption.[21] The trial court specifically held that "[t]he significance of the evidence of non-compliance by schools with state minimum standards is that the General Assembly has established a system of common schools throughout the state in which the overwhelming majority of schools are substandard as measured by the state's own criteria." Findings of Fact and Conclusions of Law, at page 56.

Therefore, to the extent that some children are forced to attend schools which are so poorly funded that they cannot meet state "minimum standards," they are being deprived of educational opportunity. Such a system is not "thorough and efficient."

---

[21] In 1976, 17 of Ohio's school districts were forced to apply to the State Auditor for closing audits, pursuant to R. C. 3313.483. Seven "audit" districts actually closed.

In 1977, 51 school districts were forced to apply for closing audits under R.C. 3313.483, and the results of the audits showed that 33 of the districts would have had deficits if they completed the school year.

THE SUPREME COURT OF THE STATE OF OHIO

No. 78-1284

THE STATE OF OHIO,)
)
City of Columbus.)

To wit:
1979 TERM
June 13, 1979

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI et al.,
Appellees and Cross-Appellants,

vs.

FRANKLIN B. WALTER et al.,
Appellants and Cross-Appellees.

MANDATE

To the Honorable Common Pleas Court, Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed in part and affirmed in part for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN,
Clerk

---------- 19____
---------- Deputy

Docket Fee . . . . . $25.00 Paid by Attorney General
Docket Fee . . . . . $25.00 Paid by John A. Lloyd, Jr.

• • •

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-780001

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,
Plaintiffs-Appellees,

v.

FRANKLIN B. WALTER,
Superintendent of Public Instruction, et al.,
Defendants-Appellants.

OPINION

(Filed September 5, 1978)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Mr. John A. Lloyd, Jr. and Ms. Nancy A. Lawson, 610 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellees,

Messrs. William J. Brown, Attorney General, David H. Beaver, Henry A. Arnett and Ms. Nina Rose Hatfield, Assistant Attorneys General, 15th Floor, 30 East Broad Street, Columbus, Ohio 43215, for Defendants-Appellants.

KEEFE, P. J.

This cause came on as the appeal of a suit for declaratory and other relief to hold the Ohio system of financing public elementary and secondary education unconstitutional under the Ohio Constitution. The trial court decided that this is a

proper class action and the following constituted the ultimate list of parties plaintiff:

A) The Board of Education of the City School District of the City of Cincinnati;

B) Members of that Board;

C) The Superintendent of Schools, City School District of the City of Cincinnati;

D) The Clerk-Treasurer of the City School District of the City of Cincinnati;

E) The named students who reside in the City School District of the City of Cincinnati and who attend the Cincinnati public schools;

F) The named parents of children attending such schools who also are owners of real property located in the Cincinnati School District;

G) All of the above on behalf of themselves or in their representative capacities, and as representative parties on behalf of all similarly situated school districts in Ohio, the members of the boards of education for such school districts, all administrators employed by such school districts, the students who reside therein and attend public elementary and secondary schools operated by such school districts, the parents of such students, and the owners of real property situated in such school districts.

The parties defendant are the Superintendent of Public Instruction, State of Ohio, with whom rests the responsibility of calculating the amounts of state aid payable to each school district under Chapter 3317 of the Revised Code; the State Board of Education; the Department of Education; and the Controlling Board which administers the School Foundation Program, a program authorized by Chapter 3317 of the Revised Code.

The trial court's Declaratory Judgment Order follows:

The Court finds that there is no just reason for delay in acting upon the plaintiffs' claim for declaratory relief and that, indeed, the interests of the plaintiffs and the general public require that such a final order be now made. In making this order, however, the Court recognizes that there are additional claims presented by the Complaint, including a claim for attorneys' fees, over which the Court is expressly reserving jurisdiction at this time and which will be decided, when appropriate, as the rights of the parties and the interests of justice require.

In consideration of the entire record in the case and the applicable law, and in consideration of the FINDINGS OF FACT AND CONCLUSIONS OF LAW filed contemporaneously herewith, the Court hereby makes the following ORDER:

In accordance with O.R.C. § 2721.02, the Court declares, adjudges and decrees:

(a) that the statutory system which the General Assembly has established for financing public elementary and secondary education is depriving the members of the plaintiff class of school children of the rights conferred upon them by Article VI, § 2 of the Ohio Constitution to attend school in a thorough and efficient system of common schools throughout the state and by Article I, § 2 of the Ohio Constitution to equal protection of the laws;

(b) that this system is interfering with and impairing the discharge of oaths taken by members of the plaintiff classes of school board members under Article XV, § 7 of the Ohio Constitution and O.R.C. § 3313.10 to support the constitution of this state and to perform faithfully their duties, and the discharge by such school board members of the duties imposed upon them by O.R.C. § 3313.47 to manage and control all public schools and by O.R.C. § 3313.48 to provide for the free education of the youth of school age within each district, and

that it is interfering with the discharge by the members of the plaintiff class of school district administrators of their duties provided by law;

(c) that the statutory system which the General Assembly has established for the financing of public elementary and secondary education represents the abdication by the General Assembly of the duty which devolves upon it under Article VI, § 2 of the Ohio Constitution to "make such provision . . . . as will secure a thorough and efficient system of common schools throughout the state;

(d) that O.R.C. §§ 3317.022, 3317.023(A), (B) and (C), 3317.53(A) and (B), 3317.02(E), and Section 30 of Am. Sub. SB 221 violate Article VI, § 2 of the Ohio Constitution and are therefore void and no longer operative;

(e) that the statutory system which the General Assembly has established for the financing of public elementary and secondary education establishes invidious classifications among school children which are neither supported by any compelling state interest nor predicated upon any rational basis, and that the system thus violates the equal protection and benefit clause of Article I, § 2 of the Ohio Constitution;

(f) that O.R.C. §§ 3317.022, 3317.023(A), (B) and (C), 3317.53(A) and (B), 3317.02(E), and Section 30 of Am. Sub. SB 221 violate Article I, § 2 of the Ohio Constitution and are therefore void and no longer operative.

The Court hereby declares that O.R.C. §§ 3317.022, 3317.023(A), (B) and (C), 3317.53(A) and (B), 3317.02 (E), and Section 30 of Am. Sub. SB 221 are unconstitutional and hence void and hereafter inoperative.[1]

---

[1] All of these sections are part of the public statutory law of this state and as such readily judicially noted. (Our footnote.)

The Court realizes, however, that the funds which are paid to school districts in basic aid under O.R.C. § 3317.022 are essential to the continued operation of most of the school districts in the state. The Court also realizes that the enactment of a valid statutory system for financing public elementary and secondary education may reasonably consume six months' time and that the ends of justice would not be served by an order which would further cripple the public schools during the balance of the 1977-78 school year.

In light of these considerations, the Court hereby suspends the effect of this order until July 1, 1978.

Defendant's Exceptions Preserved.

The Clerk is directed to enter this document as the Judgment Entry of this Court on the plaintiffs' claim for declaratory relief.

Appellants advance five assignments of error, the first of which alleges that:

> The trial court erred in overruling defendant's motion to dismiss and in exercising jurisdiction in this case in violation of the separation of powers doctrine.

In amplification of their assignment one, appellants contend that the judgment *supra* determined issues "constitutionally committed to a coordinate branch of government."

In effect the appellants claimed in their motion to dismiss, which they urged upon the court at least twice during trial proceedings, that the legislature's power in the field of public school financing – under the Ohio Constitution – is plenary and exclusive and free from any judicial review whatsoever. We cannot assent to that postulation. As far removed in time as Chief Justice Marshall's pronouncement in *Marbury* v. *Madison*, (1803), 5 U.S. (1 Cranch) 137, it has been decided that courts have not only the right, but the obligation to interpret the Constitution (be it federal or state) and declare

unconstitutional statutes inoperative. As stated by Chief Justice Marshall:

> The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. (5 U.S. at 176).

Because the judicial review doctrine is so firmly established in the law, we refrain from listing numerous authorities which support the principle. Nevertheless, we note one Ohio Supreme Court opinion – *State* v. *Masterson* (1962), 173 Ohio St. 402, 183 N.E.2d 376 – in which the author states:

> Respondents contend, however, that in the present instance the failure to act . . . . is one in which the judiciary cannot interfere.
>
> It has long been an established principle of law that courts do not interfere in political or legislative matters except in those instances where legislative enactments violate the basic law. In those instances where enactments violate the basic law, it was determined early in our judicial history that the courts have not only the power but the duty to declare such enactments invalid.
>
> One of the basic functions of the courts under our system of separation of powers is to compel the other

> branches of government to conform to the basic law. (183 N.E.2d at 379.)

The complaint includes allegations – on their face, arguably meritorius – challenging the constitutionality (under the Ohio Constitution) of certain statutes. The complaint presents a justiciable cause, and the court below decided correctly in overruling appellants' motion to dismiss. Resultantly, the initial assignment of error is devoid of merit.

The second assignment follows:

> The trial court erred by determining that named plaintiffs – an entity created by state statute and holders of public offices created by state statute – have standing to maintain this lawsuit which involves constitutional challenges against state statutes.

Our best evaluation of the full thrust of this assignment, aided by appellants' conception of what issues the assignment raises, is a three-pronged contention. First, the parties plaintiff (excepting the students, and their parents as such, and as property owners) are creatures of statute and cannot raise constitutional challenges against other statutes enacted by their creator, the Ohio General Assembly – somewhat similar to the unacceptable notion of biting the hand that feeds you; second, these parties plaintiff cannot assert the legal and constitutional rights of others; and third, "they have suffered no injury in fact and are not the designated beneficiaries of the constitutional guarantees in question."

So far as the legal capacity of the statutory creatures to challenge the constitutionality of state statutes passed by the creator-legislature is concerned, there seem to be many cases on the subject, and peripheral thereto, decided by state and federal courts, with disparate results.[2] Appellees argue that

---

[2] It is noted that the statutory creatures here do not challenge the statutory authority for their own existence. Such would be a factually distinguishable pattern from that now before us for review.

all of appellants' authorities in support of the instant assignment emanate from other states or the federal courts – and we are reminded by appellees and *amici curiae* that the principles applied by the federal courts to govern standing are more restrictive than those employed by state courts. We are advised that state courts have never developed a law of standing that is "so complicated or artificial"[3] as that developed in the federal courts. While no Supreme Court of Ohio decision precisely in point has been brought to our attention, nevertheless one recent pronouncement points to the conclusion which we believe is indicated with respect to the initial issue of the assignment. The case is: *Canton* v. *Whitman* (1975), 44 Ohio St. 2d 62; 337 N.E.2d 766. On July 1, 1974, the Ohio Director of Environmental Protection issued an order directing the City of Canton to begin flouridating its water which the city did not wish to do. The city sought administrative and judicial relief from the operation of a certain state statute requiring flouridation, and the Supreme Court ultimately ruled against Canton. However, the Supreme Court did consider and decide Canton's claim that the statute mandating ffouridation was an invalid exercise of *state* police power. The role of Canton seems comparable to the capacities of the so-called "statutory plaintiffs" *sub judice*. The Supreme Court did not shrink from considering a matter in which a creature of statute – the City of Canton – challenged a certain flouridation statute enacted by the General Assembly.

Albeit not an Ohio decision, there is another pronouncement – more in point than *Canton* – the reasoning and result of which we find apt, sound and persuasive. In *Cronin* v. *Lindberg* (1977), 66 Ill. 2d 47, 360 N.E.2d 360, the Supreme Court of Illinois explicitly held that a school board may assert a denial of equal protection of the laws. Mr. Justice Underwood wrote:

> A school board may, however, assert a denial of equal protection of the laws if it is a member of a class being discriminated against [citations omitted], and the allegation that the effect of the reduction in State aid here was to discriminate "against relatively poorer school districts such as Chicago" merits consideration.

[3] K. Davis, Administrative Law 422 (3 ed. 1972).

Two other recent cases in which boards of education are accorded standing as plaintiffs are *Seattle School District No. 1 of King County* v. *State of Washington*, Case No. 53950 (Super. Ct. of Thurston County, Jan. 14, 1977), and *Board of Education, Levittown Union Free School Dist., Nassau County* v. *Nyquist*, Case No. 8208/74 (Supreme Court of New York, Nassau County, June 23, 1978).

The quoted language of the Illinois Supreme Court, *supra*, offers little or no support for including as parties the Cincinnati Superintendent of Schools or the Clerk-Treasurer of the District. However, we believe that since the thrust of appellants' challenge primarily attacks the Board's standing, the fate of these two officers – as directly tied as they are to the Board – should rise or fall with the decision as to the Board's standing.

We proceed to evaluate the next issue raised in the assignment, that is, whether the Cincinnati Board of Education, its members and administrative officers, can assert the legal and constitutional rights of others – presumably the "others" meaning students. First of all, the Board and its members and administrative officers have rights of their own they are entitled to pursue. If the members of the Cincinnati Board of Education take seriously their oath of office "to perform faithfully [their] duties" – as presumably they do – and the administrative officers are similarly conscientious, the duties of these officers must reasonably be held to include attention to a lawful and effective system of financing the school operation of which they all form such an integral part. Appellants, moreover, seem to overlook the fact that the pupils *themselves* are party plaintiffs and thus in a position to lay claim to their own rights without relying on the Board, its members and the

administrative officers to do so for them. However, in addition, we believe that because of the general public interest involved, the Board, its members and the administrative officers may also raise the rights of the students who attend the state's public schools. A text writer's view on this subject is expressed thus in 10 O. Jur. 2d Constitutional Law § 139:

> [T]he courts of Ohio have recognized that a question of general public interest may be raised by a public officer even though there is some doubt that he has any [personal] right in the matter.[4]

Finally, do the Cincinnati Board of Education, its members and administrative officers lack standing because "they have suffered no injury in fact and are not the designated beneficiaries of the constitutional guarantees in question"?

The statutory plaintiffs are responsible for providing educational opportunities for the youth of the district. The Cincinnati School District, as well as the other districts in the same class, is the designated beneficiary of the statutes which provide for the financing of public education. These plaintiffs would necessarily be affected in an adverse way in performing their statutory duties by a decision in this case upholding Ohio's system of financing public education. The Board, and these officers, appear to us to have a clear stake in the outcome of the controversy. If this case had been commenced *without* the Board of Education and its members, it is difficult to imagine that they would not have been joined as parties necessary for a just adjudication under Civ. R. 19 (A)(2). Moreover, the appellants have been unable to convince us that these statutory plaintiffs are so callous and indifferent to the performance of their official duties that they might be said to have no true stake in the state of school

---

[4] The case cited in the O. Jur. footnote is *State ex rel. Bruestle* v. *Rich* (1953), 159 Ohio St. 13, 110 N.E.2d 778, which was a mandamus proceeding brought by the city solicitor of Cincinnati to require other city officials to take action with a slum rehabilitation program.

financing, no matter what difficulties exist. Furthermore, we emphasize that public officers in Ohio have been held to have standing to raise issues of general public interest even though their personal concern is minimal or difficult to delineate or quantify. See *State ex rel. Bruestle* v. *Rich, supra,* n. 4.

Therefore, we overrule the second assignment of error, and having done so, cannot refrain from questioning the significance of the assignment. Even were these statutory plaintiffs found to lack standing, it is only reasonable to assume that the constitutional questions raised in this action would nevertheless be pursued by the students, parents, and property owners without the participation of the other plaintiffs. The assignment seems "much ado about nothing."

There follows the verbatim third assignment of error:

> The trial court erred by determining that R.C. 3317.-022, R. C. 3317.023(A), (B) and (C), R. C. 3317.53(A) and (B), R. C. 3317.02 (E) and Section 30 of the amended substitute Senate Bill 221 violate the "thorough and efficient system" clause of Article VI, Section 2 of the Ohio Constitution. [Adopted Conclusions, T.d. 227 at pp. 353-372 and Judgment Entry, T.d. 230 at ¶¶ c and d.][5]

In support of the third assignment appellants assert the following in their brief:

> This Court of Appeals must recognize that in order to uphold the trial court's decision that the present system, and specific portions of it, violate Article VI, Section 2 of the Ohio Constitution . . . this Court must hold that

---

[5] The pertinent part of Article VI (Constitution of Ohio) is as follows:

§ 2 School funds.

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

> the lower court had the authority and the ability to usurp the plenary power of the General Assembly in education. This Court must hold that the trial court acted within proper judicial bounds in substituting its judgment for that of the legislative and executive branches of government as to what constitutes high quality education in this State and as to what is the most appropriate method to secure such an education. This Court must further hold that the trial judge could disregard the law and the evidence establishing the constitutionality of the system and could, instead, declare the system invalid on such grounds as that the system does not provide an unlimited source of monies to fund pet projects not essential to maintenance of complete, high quality education.

Moreover, appellants assign as error the trial court's declaration in the judgment entry that the system which the General Assembly has established for the financing of public elementary and secondary education "represents *the abdication by the General Assembly* of the duty which devolves upon it under Article VI, § 2 of the Ohio Constitution. . ." (Emphasis supplied.)

We find ourselves favorably impressed by the thrust of the third assignment, challenging as it does, interference by the judicial department with the legislative, and conclude that the assignment is well taken. The court below erred and overstepped its power in deciding that the finance system for public schools adopted by the General Assembly represents an "abdication" by the Assembly of its duty under Article VI, § 2 of the Ohio Constitution. Although exceptions have been judicially recognized, the general rule of noninterference enjoys widespread acceptance; that is, the courts have no power to enforce the mandates of the constitution which are directed at the legislative branch of the government or to control the work of the lawmakers. As written in 16 Am. Jur. 2d Constitutional Law § 226, "[t]he courts have no general supervision over legislation and are without power to review the exercise of legislative discretion." Although the courts

have inherent authority to determine whether statutes transcend the limits imposed by federal and state constitutions and to determine whether such laws are or are not constitutional, the trial court here attempted to discount the wide range of discretion permitted the General Assembly. That courts have no power to substitute their judgment for that of the legislature is axiomatic. Moreover, not only is the General Assembly entitled to wide discretion in the passage of all legislation, including of course statutes which provide for the financing of public schools, but as a result of the clear and doctrinaire language of Article VI, § 2 that the General Assembly shall provide for a "thorough and efficient system" of public schools, the sovereign people of the State of Ohio have unequivocally indicated – through their constitution – the department of government (the legislative) which is to have the responsibility for the state's public school system. Because this constitutional grant reenforces the ordinary discretion reposed in the General Assembly in its enactment of legislation, the judicial department of this state should exercise great circumspection before declaring public school legislation unconstitutional as a violation of Article VI, § 2. We do not have here a situation in which the General Assembly has failed to act; it is obvious from the number of statutes involved in the instant appeal, and otherwise, that the legislature has acted and passed laws which presumably in its discretion provide a "thorough and efficient system" of schools.[6] That the judiciary of this state may believe that a different plan, another system, may be more thorough or more efficient is not a sufficient basis in law for wresting from the General Assembly a power with which the state's constitution endows it. Presumably the Assembly believes that it has enacted school financing laws consistent with Ohio's constitution. In

---

[6] For an overview of the legislature's attention to the problem, see the forty-three page Report of the Education Review Committee of the 110th General Assembly of Ohio, dated Dec. 15, 1974, and included in the record herein as "Defendant Exhibit II-A-4."

effect, the court below disagreed with what is a "thorough and efficient system." The insurmountable obstacle confronting the trial court, however, is the terminology of Article VI, § 2 which in simple and straightforward language designates the General Assembly as the branch of government with the power to determine a system which is "thorough and efficient."

The Supreme Court has recognized the plenary power of the General Assembly under Article VI, § 2. In *State ex rel. Methodist Children's Home Association of Worthington* v. *Board of Education* (1922), 105 Ohio St. 438, 138 N.E. 865, the Supreme Court stated:

> Pursuant to the authority so vested the legislative branch of the state has enacted the laws to which we have referred, and many others, with a view to making most adequate and satisfactory provision for the efficient education of the youth of the state. *With the wisdom or the policy of such legislation the court has no responsibility and no authority.* Its duty is limited to the interpretation of such provisions as are not clear, and the carrying into execution of laws enacted which are not in conflict with constitutional provisions. It cannot be contended that any provision of the constitution is violated by the statutes here in question, and we find not only that such statutes do not enjoin upon the defendants a duty which the relator seeks to enforce, but, on the contrary, clearly warrant the attitude and action of the board of education.
>
> It is neither the province nor the right of courts to annul the plain provisions of the statute because of the belief that the observance or enforcement thereof will work an inconvenience. The remedy is with the legislature. . . . [S]uch unwarranted usurpation of the legislative power merits the condemnation usually accorded it after full and candid consideration and upon deliberate and mature judgment. (105 Ohio St. at 448, 449. Emphasis ours.)

In *The County Board of Education of Hancock County, et al.* v. *Moorehead, et al.* (1922), 105 Ohio St. 237, 136 N.E. 913, the Supreme Court asserted:

> The power of the legislature, therefore, with reference to public schools is plenary. 105 Ohio St. at 244.

We have previously cited *Cronin* v. *Lindberg* (1977), 66 Ill. 2d 47, 360 N.E.2d 360, in which the Supreme Court of Illinois was confronted with the issue of whether certain statutory sections providing for financial aid to schools were compatible with the Illinois Constitution. The author of the opinion wrote:

> It is not the function of this court to question the wisdom of legislation which does not contravene constitutional safeguards. (360 N.E.2d at 365.)
>
> • • •
>
> This court has consistently held that the question of the efficiency of the educational system is properly left to the wisdom of the legislature. (360 N.E.2d at 365.)

In holding the indicated school financing statutes invalid, under Article VI, § 2, the trial court placed great reliance upon *Miller* v. *Korns* (1923), 107 Ohio St. 287, 140 N.E. 773. We note that *Miller* v. *Korns*, *Methodist Children's Home*, and *Board of Education of Hancock County* all enjoy an almost contemporaneous genesis. Because the Supreme Court in *Miller* v. *Korns* found the legislative enactments it was reviewing to be valid and constitutional under Article VI, § 2 and because the observations in *Miller* v. *Korns* upon which the trial court in the matter *sub judice* relied were *dictum*, we find the Supreme Court's pronouncements in *Methodist Children's Home* and *Board of Education of Hancock County, supra*, much more pointed and persuasive than *Miller* v. *Korns*. Moreover, *Miller* v. *Korns* recognizes the establishment of a statewide system of schools as being a legitimate taxing purpose, and the Supreme Court also recognized therein that the

judiciary must defer to the legislature in the involved area of school finance. The *Miller* v. *Korns* court found *Sawyer* v. *Gilmore* (1912), 109 Me. 169, 83 Atl. 673 to be "exactly in point," and quoted from *Sawyer* as follows:

> 4. The particular method of distribution rests in the wise discretion and sound judgment of the Legislature.
>
> The Constitution provides no regulation in this matter and it is not for the court to say that one method should be adopted in preference to another. We are not to substitute our judgment for that of a co-ordinate branch of the government working within its constitutional limits. (107 Ohio St. at 301.)

Thus, we sustain assignment of error three.

The penultimate assignment – the fourth – claims that the trial court erred by determining that the subject school financing statutes violate Ohio's equal protection clause contained in Article I, § 2 of the state constitution. The lower court concluded that discriminations existing in the educational opportunities of school children, created by the present financing system, impair the fundamental right to an education guaranteed by Article VI, § 2 of the Ohio Constitution. The trial court, applying strict judicial scrutiny,[7] determined that no compelling state interest justified the discriminations between school children in Ohio.

Although the judiciary cannot package for the legislature a thorough and efficient system, courts nevertheless have the obligation to determine whether the system *in esse* contravenes the equal protection and benefit clause of the Ohio Constitution. A leading case in the area of education and equal protection is *San Antonio Independent School Dist.* v. *Rodriguez* (1973), 411 U.S. 1. In *Rodriguez,* the United States Supreme Court was faced with a challenge to the Texas system for financing public education on the basis of 14th Amendment equal protection guarantees. The Supreme Court first decided that strict scrutiny was not appropriate because education is not a right afforded protection under the *federal* constitution. By logical inference, if the Supreme Court had decided that there is a right to public education under the federal constitution, strict judicial scrutiny would have been the proper test. Since *Rodriguez* holds there is no such right, the court applied a less demanding "rational basis" test. Concurrently indicating its inclination to adhere to the principle of federalism, the Supreme Court then sustained the Texas legislation.

[7] This step in equal protection analysis becomes necessary when a fundamental right is impinged. *Zablocki* v. *Redhail* (1978), 98 S. Ct. 673; *San Antonio Independent School Dist.* v. *Rodriguez* (1973), 411 U.S. 1.

In the instant case, however, the statutory system is challenged on the basis of provisions in the *Ohio* Constitution, not the 14th Amendment to the U.S. Constitution. We agree with the trial court that the right to a public education is guaranteed by the Ohio Constitution. Article VI, § 2 – at least implicitly – endows the youth of Ohio of elementary and secondary school age with the fundamental right to the educational benefits which naturally flow from a "thorough and efficient system of common schools throughout the state." Moreover, the "equal protection and benefit" clause of Article I, § 2 of the Ohio Constitution requires that the educational opportunities available to school children should be equal.

Our obligation then becomes to determine whether the operation of the challenged statutes results in such inequality of educational opportunities as to impinge upon the fundamental right. For this purpose we turn to the trial record. First, the trial court clearly found that:

> The uncontroverted evidence shows that not only are there vast disparities in expenditures for instruction and instructional components among the school districts in Ohio, but the testimony demonstrates that these expenditure variations also produce very great disparities in

the quantity and quality of the educational services which the districts provide to their students, and the Court so finds. (Trial court's Findings of Fact and Conclusions of Law, p. 157.)

Conclusions of the court below included the following:

Violations of Article I, Section 2
Of The Ohio Constitution

(7) An examination of the law and the evidence demonstrates that the disparate treatment which school children among the school districts in Ohio are accorded under the present system is the result both of the system in general and of the purpose and effect of certain specific statutes. Each of the separate statutes which have a demonstrably discriminatory purpose or effect upon school children is the subject of a separate contention on the part of the plaintiffs and each must be separately evaluated as a matter of law. In a larger sense, however, the ultimate fact of widely disparate expenditures per pupil among the districts and widely disparate educational offerings from substandard to high quality with most of the school children receiving offerings tending to be substandard, all of which are based upon disparities in property and income wealth, demonstrates that the entire system discriminates cruelly against a majority of Ohio's school children. (Summary, Findings of Fact and Conclusions of Law. P. 118.)

(8) There is a relationship in general between the total number of dollars per pupil which a school district has and the quantity and quality of the educational services which that district provides to its students. There is also a relationship in general between the delivery of educational services to children and the educational achievement of children. The differentials which exist in financial capacity among school districts represent real and immediate differences in potential educational achievement on the part of the school children in Ohio. Because the system is one in which vast differentials in resources exist among the school districts, the present system for financing public elementary and secondary education in Ohio deprives the school children of Ohio of an essentially equal opportunity to achieve and advance educationally and equip themselves for future life. (Summary, Findings and Conclusions, p. 119.)

Our examination of the 7500-page transcript of proceedings impels us to decide that the evidence supports the trial court's findings and conclusions that the statutory system results in unequal educational opportunities for the children of Ohio.[8] We now turn to the final analytical step required by *Zablocki* and *Rodriguez*, to apply a critical examination — in other words, strict scrutiny — to the state interest advanced in support of the financing sections. State interests cannot constitutionally interfere with the fundamental right of Ohio children unless the interests can be characterized as "compelling" and "closely tailored to effectuate only those interests."[9]

Appellants maintain that the compelling state interest reflected in the questioned statutes is the desirability of retaining and fostering local control over education. They emphasize the importance and necessity for local control — local determination — in a state as diverse as Ohio. They further insist that with local control, as authorized under the existing financial system, there is bound to be some disparity among the 617 school districts. However, we do not find local control to be a compelling state interest of the magnitude or per-

---

[8] Considerable cogitation occurred concerning the extent to which this Opinion should go in chronicling how the evidence supports the judgment below vis a vis Article I, § 2. The record as it reached the Court of Appeals is colossal, including almost 400 pages of Findings of Fact and Conclusions of Law — and in addition, a 124-page summary thereof. Trial time below from commencement until filing of the Findings of Fact and Conclusions of Law consumed a full year. Since the entire record enjoys ready availability for interested scrutinizers, we perceive no justification for further lengthening this product by including specific examples of evidentiary material from the overall record.

[9] *Zablocki* v. *Redhail*, 98 S. Ct. 673, *supra*.

suasiveness which justifies interference with the fundamental right of this state's children equally to benefit from the state's system of public school financing. This court philosophically favors local control of public schools, but under the present system local control all to often means that local voters defeat school levies and therefore local school boards are forced to offer educational opportunities which are below par. The constitutional responsibility to provide for education rests with the legislature, and we cannot perceive a compelling state interest in local control which in effect thwarts the legislature in the exercise of this responsibility. We believe that there are other methods of financing the public school system which will maintain the salutary features of local control without the disequalizing effects fostered by the present system. Moreover, real property taxation seems a permissible ingredient of the funding system, as long as the state does not overrely upon it. The guiding constitutional principle must be equality of educational opportunity for all the children of Ohio rather than utilization of well intended but nevertheless miscarrying formulae such as the wealth neutral plan or the "reward for effort" program.

Therefore, we affirm the trial court's judgment that the system for public school financing in Ohio violates Article I, § 2 of the Ohio Constitution. As a result of the clear command of Article VI, § 2, the General Assembly should reexamine the state's public school financing system and enact a support plan conforming to the equal protection and benefit clause of Article I, § 2 of the Constitution of this state, a development which we believe should be forthcoming in the near future. Accordingly, we overrule the fourth assignment.

In the fifth and final assignment appellants urge that the trial court erred by determining this case to be properly maintainable as a class action under Ohio Civil Rule 23.

The first of two issues appellants present is as follows:

1. The class action requirement of Ohio Civil Rule 23 (C) (3) that the judgment include and describe those whom the court finds to be members of the class is not satisfied and is, instead, ignored and violated where the class description is vague because:

A. It expressly leaves the class definition "open-ended";

B. It expressly characterizes the class as one "inappropriate to define . . . . with . . . . specificity";

C. It generally describes the class as those "similarly situated" to a statutory entity (the Cincinnati City School District) while it expressly rejects definition of "similarly situated" in that it is "impossible to draw a precise line" separating class members who are and are not situated similarly to the statutory entity (the Cincinnati City School District);

D. It depends upon the inclusion of statutory entities (school districts) when there is no such statutory entity named as a plaintiff in this case.

Civil Rule 23(C)(3) states:

> (3) The judgment in an action maintained as a class action under subdivision (B) (1) or (B) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

The trial court, in its judgment entry making the final class determination, described the plaintiff class of school districts in the following language:

> A. The school districts which comprise the plaintiff class of school districts include each school district which is similarly situated to the Cincinnati City School District in its financial inability to deliver to the school children it has the duty to educate that level and quality of educational opportunity which is mandated by Article VI,

> Section 2 and Article I, Section 2 of the Ohio Constitution.

The court further stated:

> Because of the multiplicity of factors which bear upon the ability of a district to provide the level and quality of educational opportunity which the Ohio Constitution requires, it is impossible to draw a precise line separating the districts in this state which are situated similarly to the Cincinnati District in ability to provide a constitutionally acceptable level and quality of education from those which are not similarly situated. It is clear from the evidence, however, that all but a small percentage of the school districts in Ohio are financially unable to provide a constitutionally acceptable level of education at the present time.
>
> Moreover, it is necessary that the class consideration in this litigation remain openended. It is obvious that any line drawn now for the purpose of excluding any school districts from the plaintiff class would doubtless have to be modified in future years. Thus, it is inappropriate to define the plaintiff class of school districts with more specificity than as stated above.

First we address the appellants' challenge to the classification of "school districts" when no such statutory entity is named as a plaintiff in the case. We note that in the first paragraph of the complaint the statutory entity is named as "the Board of Education of the City School District of Cincinnati (sometimes referred to herein as the Cincinnati School District)." We view these terms to be interchangeable for purposes of this action, and find appellants' argument contrariwise to lack merit.

We next consider the alleged error that the court found

it impossible to draw a precise line separating districts similarly situated to Cincinnati in ability to provide quality education from those districts not similarly situated. In a Civ. R. 23(B)(2)[10] class action, in which plaintiffs pray for injunctive or declaratory relief with respect to the class as a whole, such as here, the fact that the class lines cannot be precisely drawn is not a fatal flaw. The Advisory Committee Notes to Federal Rule 23 state that 23(B)(2) actions have often been filed "in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Because the relief sought here is not money damages for individual class members as in a 23(B)(3) class suit or the distribution of money from a common fund as in a 23(B)(1) suit, a failure to name the members of the class with exactitude fails to prejudice the defendants-appellants. The U.S. Court of Appeals for the First Circuit has pointed out further distinguishing characteristics of a 23(B)(2) suit:

> [N]otice to the members of a (b)(2) class is not required and the actual membership of the class *need not therefore be precisely delimited.* In fact, the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists. . . . (Emphasis supplied.)

Yaffe v. *Powers* (1st Cir. 1972), 454 F.2d 1362. We do not find that the trial court violated the requirements of Civ. R. 23 in its description of the class as one "inappropriate to define . . . with . . . specificity."

Appellants also take issue with the trial court's characterization of the class as "openended," and we note in con-

---

[10] The judgment entry begins by referring to this suit as a Civ. R. 23(B)(1) class action, although it later describes the suit as one brought under the provisions of Civ. R. 23(B)(2). The former designation is obviously an error since the relief sought is declaratory and injunctive in nature, thus causing the action to fall within the scope of Civ. R. 23(B)(2).

nection therewith that the final class determination also includes the words "future years." This reference to "future years" troubles us somewhat because we believe the class ought not to be indefinitely variable. We elect to interpret the openended feature of the final class determination order as signifying "districts situated similarly to the Cincinnati district" at the time of trial or, at the latest, on the date of the final judgment below. We have difficulty in conceiving of a situation in which a class can be enlarged after a final judgment entry concludes the litigation. However, we find no fatal significance to use of the phrase "future years," but we do circumscribe the concept of openendedness as indicated.

The second issue raised by appellants in this assignment follows:

> 2. The prerequisites for a proper class action determination as set out in Ohio Civil Rule 23(A) are not satisfied or complied with where named plaintiffs do not themselves have claims typical of the claims asserted on behalf of the class and where named plaintiffs take positions and assert arguments designed to defeat, rather than protect, interests of class members.

The thrust of appellants' argument here is that the interests of the alleged class members are inherently conflicting. For instance, appellants argue, the named plaintiff (Board of Education of the City School District of the City of Cincinnati) cannot represent both those districts which receive benefits such as "save harmless" funds and those districts which do not. This theory apparently presupposes that the interest which a class member seeks to vindicate through this litigation is somehow limited to the benefits which that class member now receives under the financing system. However, we perceive that the interests of the plaintiff class are broader than this. In seeking a declaration that the entire financing system results in unequal educational opportunity, the class members' paramount interest is to secure a system of financing

through which every member of the class will have sufficient financial resources to provide the educational opportunities necessary for the school children of the districts. Within this conceptual framework – and without being inconsistent – the plaintiffs may demonstrate that benefits now accrue unequally to districts in the class.[11] Although some diversity exists in the class so far as financial support is concerned, nevertheless we find no *conflicting* interests in the class of districts as certified.

Accordingly, we hold that a class action was proper in this case and overrule the assignment.

Recapitulating, we overrule assignments one, two, four and five, and although we find merit in the third – and sustain it – the judgment below must be, and is, hereby affirmed. As we have written in connection with assignment three, the trial court erred in holding the school financing plan in violation of the "thorough and efficient system" clause of Article VI, § 2 of this state's constitution, but the "equal protection and benefit" clause of Article I, § 2 of the constitution nevertheless provides a proper fundament for the judgment of the Court of Common Pleas.

BETTMAN, J., and BLACK, J., concur.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

---

[11] Although facially the scope of this fifth assignment would seem to include a challenge to the certification by the trial court of *any* of the subject classes, nevertheless as the appellants frame their issues (under the assignment), the principal thrust of the challenge is to the certification of the class of school districts. Therefore, we have evaluated the issues as thus framed. Some exiguous argument is included in appellants' brief questioning the certification as a class of all the state's public school children, but the issue is not broadly pursued and moreover we perceive no merit to the contention.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

September 5, 1978

No. C-780001

BOARD OF EDUCATION OF THE
CITY SCHOOL DISTRICT OF THE
CITY OF CINCINNATI, et al.,
Plaintiffs-Appellees,

v.

FRANKLIN B. WALTER,
Superintendent of Public Instruction, et al.,
Defendants-Appellants.

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that Assignment of Error Number 3 is well taken, and that the remaining Assignments are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, which holds the statutory system for financing public schools in Ohio, and certain specific statutes, unconstitutional in violation of the equal protection and benefit clause of Article I, § 2 of the Ohio Constitution is hereby affirmed.

It is further Ordered that a mandate be sent to the Court of

Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by their counsel, except.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

December 5, 1977

No. A7602725

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,

Plaintiffs,

On behalf of themselves and as representative parties on behalf of all similarly situated school districts in Ohio, the members of the boards of education for such school districts, all administrators employed by such school districts, the students who reside therein and attend public elementary and secondary schools operated by such school districts, the parents of such students, and the owners of real property situated in such school districts.

v.

FRANKLIN B. WALTER,
Superintendent of Public Instruction, State of Ohio, 808 Ohio Departments Building, 65 South Front Street, Columbus, Ohio 43215, et al.,

Defendants.

DECLARATORY JUDGMENT ORDER AND JUDGMENT ENTRY

The Court finds that there is no just reason for delay in acting upon the plaintiffs' claim for declaratory relief and that, indeed, the interests of the plaintiffs and the general public require that such a final order be now made. In

making this order, however, the Court recognizes that there are additional claims presented by the Complaint, including a claim for attorneys' fees, over which the Court is expressly reserving jurisdiction at this time and which will be decided, when appropriate, as the rights of the parties and the interests of justice require.

In consideration of the entire record in the case and the applicable law, and in consideration of the FINDINGS OF FACT AND CONCLUSIONS OF LAW filed contemporaneously herewith, the Court hereby makes the following ORDER:

In accordance with O.R.C. § 2721.02, the Court declares, adjudges and decrees:

(a) that the statutory system which the General Assembly has established for financing public elementary and secondary education is depriving the members of the plaintiff class of school children of the rights conferred upon them by Article VI, § 2 of the Ohio Constitution to attend school in a thorough and efficient system of common schools throughout the state and by Article I, § 2 of the Ohio Constitution to equal protection of the laws;

(b) that this system is interfering with and impairing the discharge of oaths taken by members of the plaintiff classes of school board members under Article XV, § 7 of the Ohio Constitution and O.R.C. § 3313.10 to support the constitution of this state and to perform faithfully their duties, and the discharge by such school board members of the duties imposed upon them by O.R.C. § 3313.47 to manage and control all public schools and by O.R.C. § 3313.48 to provide for the free education of the youth of school age within each district, and that it is interfering with the discharge by the members of the plaintiff class of school district administrators of their duties provided by law;

(c) that the statutory system which the General Assembly has established for the financing of public elementary and secondary education represents the abdication by the Gen-

eral Assembly of the duty which devolves upon it under Article VI, § 2 of the Ohio Constitution to "make such provision . . . as will secure a thorough and efficient system of common schools throughout the state;

(d) that O.R.C. §§ 3317.022, 3317.023 (A), (B) and (C), 3317.53 (A) and (B), 3317.02(E), and Section 30 of Am. Sub. SB 221 violate Article VI, § 2 of the Ohio Constitution and are therefore void and no longer operative;

(e) that the statutory system which the General Assembly has established for the financing of public elementary and secondary education establishes invidious classifications among school children which are neither supported by any compelling state interest nor predicated upon any rational basis, and that the system thus violates the equal protection and benefit clause of Article I, § 2 of the Ohio Constitution;

(f) that O.R.C. §§ 3317.022, 3317.023 (A), (B) and (C), 3317.53 (A) and (B), 3317.02(E), and Section 30 of Am. Sub. SB 221 violate Article I, § 2 of the Ohio Constitution and are therefore void and no longer operative.

The Court hereby declares that O.R.C. §§ 3317.022, 3317.-023 (A), (B) and (C), 3317.53 (A) and (B), 3317.02(E), and Section 30 of Am. Sub. SB 221 are unconstitutional and hence void and hereafter inoperative.

The Court realizes, however, that the funds which are paid to school districts in basic aid under O.R.C. § 3317.022 are essential to the continued operation of most of the school districts in the state. The Court also realizes that the enactment of a valid statutory system for financing public elementary and secondary education may reasonably consume six months' time and that the ends of justice would not be served by an order which would further cripple the public schools during the balance of the 1977-78 school year.

In light of these considerations, the Court hereby suspends the effect of this order until July 1, 1978.

Defendant's Exceptions Preserved.

The Clerk is directed to enter this document as the Judgment Entry of this Court on the plaintiffs' claim for declaratory relief.

SO ORDERED.

/s/ PAUL E. RILEY
Judge, Court of Common Pleas
Hamilton County, Ohio
(by assignment)

DAVID H. BEAVER, ESQ.
Trial Attorney for Defendants
Assistant Attorney General

WILLIAM J. BROWN, ESQ.
Attorney for Defendants
Attorney General
15th Floor, State Office Tower
30 East Broad Street
Columbus, Ohio 43215

ARMISTEAD W. GILLIAM, JR., ESQ.
CHARLES J. FARUKI, ESQ.
Special Counsel for Defendants
Smith & Schnacke
2000 Courthouse Plaza NE
10 West Second Street
Dayton, Ohio 45401

JOHN A. LLOYD, JR., ESQ.
Trial Attorney for Plaintiffs

NANCY A. LAWSON, ESQ.
Attorney for Plaintiffs

610 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202
(513) 381-7200